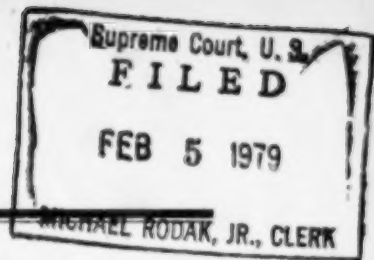


78-1222

No.



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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1978

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**WESTERN COMMUNICATIONS, INC.,** *Petitioner,*

*v.*

**FEDERAL COMMUNICATIONS COMMISSION and  
LAS VEGAS VALLEY BROADCASTING Co.,** *Respondents.*

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**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT**

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February 5, 1979

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---

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
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Petitioner Western Communications, Inc. ("Western"), licensee of KORK-TV, Las Vegas, Nevada, respectfully prays that the Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this case on October 26, 1978.

**OPINIONS BELOW**

The opinion of the Court of Appeals, not yet reported, is reprinted in the Appendix, pp. 1a-16a, *infra*. It affirmed in part and reversed in part orders and

opinions of the Federal Communications Commission ("FCC") reported at 59 F.C.C.2d 1441 (1976), *recon. denied*, 61 F.C.C.2d 974 (1976), reprinted in the Appendix, pp. 17a-61a, *infra*. The Initial Decision of the Administrative Law Judge ("ALJ"), reported at 59 F.C.C.2d 1463 (1974), is reprinted in the Appendix, pp. 62a-142a, *infra*. Other relevant orders under review are reprinted in the Appendix, pp. 143a-156a, *infra*.

### JURISDICTION

The opinion and judgment of the Court of Appeals was entered on October 26, 1978. Western's timely petition for rehearing and suggestion for rehearing *en banc* was denied on December 29, 1978, Appendix, pp. 157a-158a, *infra*. The Court of Appeals stayed issuance of its mandate until February 6, 1979, to permit filing of this petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### QUESTIONS PRESENTED

1. Is mere "preponderance of the evidence," rather than "clear and convincing evidence," the correct standard of proof for adjudicating issues of fraud and misrepresentation leading to imposition of the FCC's most severe sanction (termination of license)?

2. Did the Court of Appeals conduct adequate judicial review of claimed arbitrary and capricious agency action when it upheld imposition of the FCC's most severe sanction on Western without requiring the FCC to explain why it (a) imposed lesser sanctions on others for comparable or worse conduct in prior and subsequent cases, and (b) refused to consider or credit Western's defenses and other factors which had ex-

cused comparable or worse conduct, or had mitigated sanctions, in other comparable cases?

3. Were Western's rights to a fair adjudicatory hearing abridged by repeated FCC violations of its rules barring premature disclosures or "leaks" of tentative decisions and related *ex parte* conduct?

4. Was it appropriate for the Court of Appeals to undertake *de novo* review concerning the application of Las Vegas Valley Broadcasting Co. ("Valley"), substitute its judgment for the FCC's, and overturn long standing, consistently applied FCC policy regarding minimum financial qualifications for new broadcast station applicants?

### STATUTES AND RULES INVOLVED

Pertinent provisions of the Administrative Procedure Act, the Communications Act of 1934, as amended, and the Rules and Regulations of the Federal Communications Commission appear in the Appendix, pp. 159a-165a, *infra*.

### STATEMENT OF THE CASE

Western and its ultimate owner, Donald W. Reynolds, have operated KORK-TV since 1955. In June, 1972, Western's triennial license renewal application for KORK-TV was ordered to an adjudicatory hearing to review performance during the 1968-1971 license term. During that term (and continuing to date) KORK-TV was the Las Vegas affiliate of the NBC Television Network. Two narrow qualifications issues were specified for hearing: (1) had the NBC network been fraudulently billed for network *commercials* that KORK-TV did not broadcast; and (2) did Western deliberately lie or withhold material information when

responding to four FCC letters inquiring whether KORK-TV had broadcast extra local commercials so as to "affect the content of network programs."

In September, 1972, Valley's mutually exclusive new station application was consolidated for hearing with Western's renewal application. Numerous qualifications issues were specified concerning Valley's application. Evidence was taken on the comparative merits of Western and Valley, but the issue of choosing between the two applicants was never reached. Both applications were denied entirely on basic qualifications issues.

Western conceded that prior to mid-1971 KORK-TV had broadcast more *local* commercials than could be fitted precisely within the time NBC had allotted for this purpose during network transmissions to the station. KORK-TV deleted—i.e., "clipped"—fractions of the network *transmission* to fit in extra local commercials. This practice was not intended or believed to displace network *commercials* that were part of the network *transmission*, or to affect adversely network *program content*. Rather, KORK-TV's policy was to clip the so-called "*clutter*" portions of NBC's *transmission*—items such as opening titles, theme music, promotional announcements, the network logo, and credits. This did not affect KORK-TV's compensation from NBC, which was based on KORK-TV's broadcast of network *commercials*.

The standard form of NBC affiliation contract obligated stations such as KORK-TV to broadcast the entire network transmission without deletion. However, clipping of network "*clutter*" was a common practice among affiliates of NBC (and other networks)

in that era (1968-71). KORK-TV's general managers, and its then outside legal counsel specializing in FCC matters, knew of the widespread industry practice; they believed that the networks were not concerned about the practice despite the contract boilerplate; and they did not believe it to be wrong under FCC rules or policies. KORK-TV stopped clipping any part of NBC transmissions by mid-1971, although the practice continued in the industry through at least 1972. The concept that "*clutter*" clipping itself was fraudulent billing was first announced by the FCC in 1973, long after KORK-TV stopped the practice. *Network Clipping*, 40 F.C.C.2d 136 (1973).

KORK-TV conceded that, if network *commercials* had been deleted while NBC was billed for them, the FCC's rule against misrepresenting the quantity of *advertising* actually broadcast would have been violated. However, KORK-TV's managers had no actual knowledge that any NBC *commercial* was both clipped and billed to NBC. No witness testified this ever happened. Rather, the fraudulent billing case against Western rests on (a) second-by-second comparisons of some KORK-TV and NBC program logs suggesting that all or part of 21 NBC commercials may have been clipped without this having been reported to NBC, plus (b) the FCC's assumption that station officials "should have known" that clipping of NBC "*clutter*" would "inevitably result" in clipping of NBC *commercials*.<sup>1</sup> Even assuming *complete* reliability of log com-

<sup>1</sup> Numerous record facts negated the reliability of second-by-second log comparisons to prove that all or part of specific NBC commercials were clipped by KORK-TV. Station logs are not required to show the precise time of local broadcast of the various parts of the network transmission. They do show what *local* com-

parisons, the only bills to NBC in the record show KORK-TV's maximum potential overbilling of NBC was less than \$325, a sum Western refunded to NBC in 1973.<sup>2</sup>

Western's responses to the four FCC inquiries were drafted by its former outside counsel, from whom no relevant facts were withheld by Western's officers. Former counsel and the two KORK-TV station managers testified (a) that they did not believe that the FCC's inquiries asked generally about "clipping" any part of the NBC transmission, (b) that they believed the FCC had asked only about clipping that affected "program content," and (c) that they saw no reason to mention explicitly the station's clutter-clipping prac-

mercials were broadcast and the approximate time of their broadcast as logged by the station engineer on duty. Network logs contain a more detailed breakdown of the components of the network transmission. The validity of comparisons between the two sets of logs is affected by such factors as the synchronization and accuracy of clocks and the accuracy of log entries made by different persons in different cities under different working conditions. The ALJ labeled log comparisons "less than perfect evidence"; noted that "accurate findings as to just what [part of the network transmission] was covered [by the extra local commercials] are difficult"; and concluded that because of these "uncertainties" only "generalized findings" could be made. (App. 70a n.4, 85a n.10). In a later case the FCC specifically found that clipping of clutter did not inevitably result in clipping commercials. Hubbard Broadcasting, Inc., 41 P&F Radio Reg.2d 979 (1977).

<sup>2</sup> Both the FCC and the Court of Appeals refer to a Western refund to NBC of over \$7000 made in 1975. (App. 5a, 21a n.7). That figure comes from an exhibit specifically excluded from the record. (App. 21a n.7). Reliance on such excluded evidence was improper and underscores Western's contentions concerning the arbitrary and capricious disparate treatment it received under an incorrectly low standard of proof.

tice which was designed, and believed in operation, not to interfere with network commercials or "program content" as they understood that term.<sup>3</sup>

The ALJ and the FCC both conceded that "program content" is not a term generally defined or understood in the industry. (App. 31a, 77a).<sup>4</sup> There was even disagreement among the FCC, the ALJ and FCC hearing counsel as to the precise scope of the FCC's inquiries. (App. 31a-32a, 77a & n.9; Court of Appeals Joint App. 1714-15). The Court of Appeals appears to have recognized the ambiguity. (App. 6a). However, no credit was given to Western's contention that its responses to the FCC's inquiries should be evaluated in light of the ambiguities in, and different interpretations of, the FCC's inquiries, as well as in light of Western's good faith reliance on counsel to interpret the questions and to advise on responses.

Of the several qualifications issues designated against Valley, three stood out: (a) availability of an NBC affiliation for Valley, given that there are more operating television stations than available networks in the Las Vegas market; (b) availability of Valley's proposed \$1,000,000 bank loan, which expired by its own terms during the FCC proceedings; and (c) whether Valley could finance access to its proposed mountaintop transmitter site. The ALJ disqualified Valley for failure to carry its burden under each of these issues.

<sup>3</sup> Two station managers testified because of a change in managers in May, 1971. The second manager eliminated all clipping shortly after taking over.

<sup>4</sup> The ALJ refused to permit a witness to answer a question phrased exactly like those in the FCC's letters because the way the question was asked "it becomes wholly subjective as to what actually happened." (Court of Appeals Joint App. 372).

Upon exceptions to the ALJ's Initial Decision by both applicants, the FCC also disqualified both of them. As to Western, the FCC concluded (a) that its general managers should have known that clipping network clutter "inevitably" would interfere with network *commercials* and *program content*; (b) that despite their imprecision, log comparisons were reliable enough to prove KORK-TV had clipped a second or more of some network commercials for which NBC was billed; (c) that Western's interpretation of the FCC's ambiguous "program content" terminology was "overly narrow" and its responses were designed to conceal KORK-TV's practice of clipping some part of the network *transmission*; and (d) that Reynolds had not supervised the operation of his station closely enough to avoid the misconduct found to have been perpetrated without his knowledge. As to Valley, the FCC concluded that Valley did have reasonable assurance of an NBC affiliation, but still found Valley financially unqualified under the bank loan and site access issues. Petitions for reconsideration filed by Western and Valley were denied by the FCC without any material change in its findings or reasoning.

During the period between oral argument before the FCC *en banc* on the morning of March 9, 1976, and publication of the FCC's written decision some four months later, there were significant events. The FCC met immediately after the oral argument, supposedly in secret, and directed preparation of a decision denying Western's renewal application. However, due to unauthorized disclosures or "leaks" by Commissioners and/or staff personnel in violation of FCC rules, 47 C.F.R. § 19.735-206, the outcome of that meeting was accurately reported (as it turned out) in the very next

editions of two separate trade journals, both dated March 15, 1976. Over succeeding weeks other trade press reports indicated further leaks and other injudicious conduct, including prohibited *ex parte* contacts, involving the outcome of this case and/or the complaints made by Western about the leaks.

Western promptly brought each trade press report and related development to the FCC's attention, claiming prejudice and requesting appropriate action or relief. Except for directing its staff to inquire into the first round of leaks, the FCC did nothing in response to Western's requests. The notion that Western could have been prejudiced was summarily rejected *before* the investigation. (App. 145a).<sup>5</sup>

The staff inquiry into the first round of leaks later established that at least one Commissioner, and assistants to three other Commissioners, had impermissibly discussed the secret FCC March 9 instructions for the *tentative* decision in this case with trade press report-

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<sup>5</sup> Even the FCC decision to have a staff investigation "leaked." The trade press reported that decision on April 5, three days *before* the April 8 release date printed on the first order made available to the parties. The FCC denied any leak, claiming the order had been released late on April 2, the date it was adopted. Apparently this was in time for trade press reporters, but Western's counsel was unable to get a copy when he sought one at the FCC on April 5 after reading the trade press accounts. To support the timeliness of release, the FCC relied on "assurances" offered it by an employee later forced to resign as chief FCC information officer for making unauthorized disclosures of other FCC matters. It later was revealed that the FCC's general counsel had disclosed the contents of the impending order to a trade press reporter on April 1, the day *before* it was adopted. The certified list of docket entries filed by the FCC in the Court of Appeals shows release of the order in question on April 8, not on April 2.

ers. The one Commissioner implicated by the staff inquiry recused himself when the FCC's final decision was formally adopted. The FCC declined any hearings on the questions of fact generated by the leaks or the claimed *ex parte* conduct related thereto. The FCC's written decisions noted the leaks, labeled them "unfortunate" but not prejudicial to Western, and warned Western not to complain anymore.

Western and Valley each appealed the FCC's decision to the United States Court of Appeals for the District of Columbia Circuit, pursuant to 47 U.S.C. § 402 (b). The appeals were consolidated for briefing, argument and decision.

The Court of Appeals affirmed denial of Western's renewal application, holding that: (a) substantial evidence supported the FCC's misrepresentation and fraudulent billing findings; (b) the FCC "death penalty" for Western was not arbitrary and capricious despite more lenient FCC sanctions in other cases involving comparable conduct; and (c) leaks, while "unfortunate," did not infringe Western's due process rights. With Chief Judge Wright dissenting, the Court of Appeals reversed the FCC's disqualification of Valley under the bank loan issue, finding that there was reasonable assurance of availability. Valley's application was remanded for further review of its "overall financial qualifications." The Court did not decide Valley's site access issue, but did affirm the FCC's decision in favor of Valley on the network affiliation issue.

#### REASONS FOR GRANTING THE WRIT

1. **This Court Should (A) Settle The Important Federal Question Of The Standard Of Proof Applicable To FCC Proceedings That Terminate Broadcast Licenses For Alleged Misconduct, And (B) Eliminate Evident Conflict At The Court Of Appeals Level Between The Standard Of Proof Governing Such FCC Cases And Comparable Proceedings Before The SEC And Other Federal Agencies.**

The Court of Appeals, like the FCC, never addressed Western's argument that administrative and judicial precedent demand that termination of its license for fraud and misrepresentation be based upon evidence with a higher degree of certainty, *e.g.*, *Greenco, Inc.*, 39 F.C.C.2d 732 (1973), than required in cases that involve less serious issues and less drastic sanctions than the administrative equivalent of the death penalty. The Court of Appeals was specifically asked to require the FCC to utilize the "clear and convincing" standard, rather than the mere "preponderance" standard, just as that Court had recently directed the SEC to utilize in *Collins Securities Corp. v. SEC*, 183 U.S. App. D.C. 301, 562 F.2d 820 (1977), and *Nassar and Co. v. SEC*, 185 U.S. App. D.C. 125, 566 F.2d 790 (1977).

Between oral argument and decision in the Court of Appeals, Western also invited to the attention of its panel another pending FCC fraudulent billing license termination case in which a different panel of the court had ordered a remand for the FCC's views as to the public interest implications of requiring "clear and convincing" evidence in such cases. *Sea Island Broadcasting Corp. v. FCC*, No. 76-1735 (D.C. Cir., filed Aug. 12, 1976). Western's appeal was decided without awaiting the FCC's report pursuant to the *Sea Island* remand.

The oversight of the Court of Appeals in not addressing this important issue of federal law in Western's case, and in not coordinating the panel decision in Western's appeal with the panel decision in *Sea Island*, was invited to the court's attention at the rehearing stage without avail. The FCC subsequently advised the Court of Appeals in *Sea Island* that "clear and convincing" should not be the standard required. *Sea Island Broadcasting Corp.*, 44 P&F Radio Reg.2d 1265 (1978).<sup>6</sup>

The Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*, neither prescribes nor suggests the standard of proof applicable to license renewal or revocation proceedings. The standard of proof an agency must follow "is the kind of question which has traditionally been left to the judiciary to resolve . . . ." *Woodby v. Immigration and Naturalization Service*, 385 U.S. 276, 284 (1966). Neither this Court nor the Court of Appeals for the District of Columbia Circuit has ever explicitly ruled on this question in an FCC renewal or revocation case. As the instant case is not

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<sup>6</sup> *Sea Island* remains pending in the Court of Appeals. If *Sea Island* ultimately requires "clear and convincing" as the standard, certiorari should be granted here and this case remanded for further proceedings in light of *Sea Island*. The continuing pendency of *Sea Island* before the Court of Appeals, and the possibility of a different outcome on the fundamental legal issue of standard of proof in a broadcast license termination case, provide strong reason for this Court to defer action on this petition until *Sea Island* is finally decided. To distinguish revocation of license in *Sea Island* from denial of Western's renewal here would exalt form over substance. In either case (a) the broadcaster suffers the "supreme penalty," and (b) once in litigation the license normally continues well beyond the nominal three-year term. *E.g.*, *Western Connecticut Broadcasting Co.*, 43 F.C.C.2d 730, 731 n.2 (1973). See 47 U.S.C. § 307(d).

the first, and will not be the last, to fall in that category, the legal question has broad impact.<sup>7</sup>

Together, *Collins* and *Nassar*, *supra*, stand for the proposition that SEC termination of federal authority to operate as a securities broker-dealer must be supported by clear and convincing evidence, particularly where there is (a) reliance on circumstantial evidence to prove fraud, and (b) imposition of a drastic sanction tantamount to deprivation of livelihood. That evidently fair, sensible and practical proposition is no less applicable to FCC termination of authority to operate a broadcast station for unfitness.

There is nothing novel about exceptions to the general rule that preponderance of the evidence is usually the appropriate standard of proof in noncriminal proceedings, including proceedings before federal agencies. This Court has often required a stricter standard of proof in civil proceedings involving severe sanctions. *E.g.*, *Woodby v. Immigration and Naturalization Service*, *supra*; *Schneiderman v. United States*, 320 U.S. 118 (1943); *Gonzales v. Landon*, 350 U.S. 920 (1955) (per curiam); *In re Winship*, 397 U.S. 358 (1970).

Grant of certiorari to decide whether the FCC should be required to use the clear and convincing standard in cases such as this is justified on multiple grounds.

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<sup>7</sup> Over the past five years the FCC has designated for hearing a total of 95 renewal and revocation adjudicatory cases. FCC Annual Reports, 1972-1976. In addition to *Sea Island*, *supra*, there are at least seven other such cases currently before the United States Court of Appeals for the District of Columbia Circuit, which has exclusive jurisdiction over such appeals. 47 U.S.C. § 402(b).

*First*, Western's conduct has been labeled "fraudulent." This Court noted in *Woodby* that the "clear, unequivocal and convincing" standard "has traditionally been imposed in cases involving allegations of civil fraud." 385 U.S. at 285 n.18. The District of Columbia Circuit in *Collins* observed that "clear and convincing" has been the standard in "literally hundreds" of fraud cases decided by United States courts of appeals. 183 U.S. App. D.C. at 305, 562 F.2d at 824. The necessity for "clear and convincing" is especially great in cases such as *Collins* and the instant one, where allegations of fraud rest solely on circumstantial evidence.<sup>8</sup>

*Second*, the sanction of termination of broadcast license, while perhaps not perceived to be as extreme as deportation, denaturalization or involuntary confinement, is nonetheless *very* severe. There is huge financial impact on the displaced licensee (Western). Even more important in the context of due process, there is very severe impact (stigma plus impairment of future employment) on the individuals who must bear the brunt of the sanction (Reynolds and the two station managers). There is also considerable adverse impact on the public from the loss of a meritorious and popular television service.<sup>9</sup> To the licensee forfeiting a

<sup>8</sup> In Western's case there was no direct evidence of either fraudulent billing or misrepresentation/lack of candor; there were only inferences drawn from log comparisons (that are subject to imprecision for various undisputed reasons), and from responses to ambiguous FCC questions whose meaning had been interpreted for Western by its counsel.

<sup>9</sup> It cannot be assumed that a new licensee promptly would replace Western or would be likely to provide as effective a service to the public as Western has in fact provided. During the license

multi-million dollar investment (without the owner's complicity in or knowledge of any alleged wrongdoing), and to station managers who may well be barred from further meaningful pursuit of their profession, the sanction is nothing short of punitive. *See Collins*, 183 U.S. App. D.C. at 306, 562 F.2d at 825.<sup>10</sup> Moreover, while a broadcast license does not create any property rights in the traditional sense, 47 U.S.C. § 301, it does carry "legitimate renewal expectancies." *E.g.*, *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 805-06 (1978); *Greater Boston Television Corp. v. FCC*, 143 U.S. App. D.C. 383, 396, 444 F.2d 841, 854 (1970), *cert. denied*, 403 U.S. 923 (1971). Given the nature and magnitude of the licensee's interest in the station, these expectancies deserve careful consideration, sufficient proof, and due process.<sup>11</sup>

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period examined in the hearing, KORK-TV provided exemplary service to the public and was the most popular station in Las Vegas. (App. 104a-127a).

<sup>10</sup> That "loss of a broadcast license would not preclude . . . obtaining a job in the broadcast industry . . ." *Sea Island Broadcasting Corp.*, *supra*, 44 P&F Radio Reg.2d at 1268 (emphasis added), does not answer the vital question as to *what kind* of job or indicate whether it could be comparable to one's former job. In *Collins*, the individual was not barred from "the securities industry"; nor does "the broadcast industry" necessarily mean the same as "broadcast station." That a person may be able to hold a lesser position in the same industry, or go into some entirely new line of work, or some different and new part of the same industry, does not lessen the "deprivation of livelihood." *See, e.g.*, *Arthur Lipper Corp. v. SEC*, 547 F.2d 171, 184 n.12 (2d Cir. 1976), *rehearing denied*, 551 F.2d 915 (1977), *cert. denied*, 434 U.S. 1009 (1978).

<sup>11</sup> It is no answer to say that denial of license renewal is not a penalty. *See FCC v. WOKO, Inc.*, 329 U.S. 223, 228 (1946). The nature of the interests at stake, not the label-of-convenience ap-

*Third*, termination of license for misrepresentation and fraudulent billing will inevitably stigmatize Reynolds and the station managers. The "basic concept of the essential dignity and worth of every human being" is reflected in the value we place on a person's good name and reputation. *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring). Labeling a person with adverse "character" findings and limiting his future employment opportunities clearly implicate liberty interests protected by due process. *E.g.*, *Rosenblatt*; *Hampton v. Mow Sun Wong*, 426 U.S. 88, 115-16 (1976). Likelihood of stigma was a key factor leading this Court to impose the "beyond a reasonable doubt standard" in juvenile delinquency proceedings. *In re Winship*, 397 U.S. at 367. Stigma from the FCC's decision here, although not resulting from involuntary confinement, warrants at least a higher standard of proof than the mere preponderance of the evidence used in a breach of contract case.

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plied to a proceeding, determine what process is due. *In re Winship*, 397 U.S. at 365-66; *In re Gault*, 387 U.S. 1 (1967). Disbarment, like denial of renewal, is "designed to protect the public," but it is nevertheless "a punishment or penalty imposed on the lawyer [broadcaster]." *In re Buffalo*, 390 U.S. 544, 550 (1968).

This case clearly meets the three-pronged due process test of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976): the private interests of Reynolds and the station managers are substantial and deserving of every reasonable procedural protection; "the risk of erroneous deprivation" of these interests and "the probable value . . . of additional or substitute procedural safeguards" are demonstrated by the marginal circumstantial evidence relied on by the FCC; and "the Government's interest, including the function involved and fiscal and administrative burdens" should not be adversely affected by applying the clear and convincing standard. *See In re Winship*, 397 U.S. at 366-67.

*Fourth*, grant of a writ of certiorari would permit reconciliation of apparent conflict between the approach of the District of Columbia Circuit in SEC cases like *Collins* and *Nassar*, on the one hand, and in FCC cases like *Western's*, on the other hand. This would serve the beneficial public purpose of promoting evenhanded administration of the government licensing function, which has grown to involve many agencies concerned with many different functions. There is no sound reason to apply different standards of proof when different agencies decide whether to terminate different types of licenses under similar circumstances with similar consequences. The Court of Appeals' failure to address this issue in a meaningful way and the importance of its resolution, both in FCC cases and in other agency proceedings, warrant grant of the writ of certiorari.

**2. This Court Should Settle The Important Federal Question Of The Duty Of Courts Of Appeals To Require Administrative Agencies To Provide Rational Explanations For Disparate Results Reached And Sanctions Imposed In Comparable Cases, And To Eliminate Conflict On This Question Between The Second Circuit And The District of Columbia Circuit.**

The Court of Appeals failed to apply the fundamental principle of *Melody Music, Inc. v. FCC*, 120 U.S. App. D.C. 241, 345 F.2d 730 (1965), that agency failure adequately to explain disparate treatment of similarly situated licensees is reversible error.<sup>12</sup> Despite *Western's* heavy reliance on the *Melody Music* doctrine, the Court of Appeals failed to cite the case or to dis-

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<sup>12</sup> There are many progeny of *Melody Music*. *E.g.*, *Public Media Center v. FCC*, No. 76-1648 (D.C. Cir. Oct. 24, 1978), and numerous cases cited therein.

cuss the doctrine, even when this oversight was invited to its attention at the rehearing stage.

Western received unexplained, radically disparate treatment in two main respects: (a) it received a much more severe sanction than that meted out to others in both prior and subsequent cases involving comparable or more egregious conduct; and (b) it was denied the benefit of defenses and mitigating factors that in other cases were held sufficient either to excuse comparable conduct or to warrant lesser sanctions.

*Sanctions.* Denial of Western's renewal application was the most severe sanction the FCC could impose—it is the administrative equivalent of the gas chamber. Yet, while Western's renewal application was being processed and litigated before the FCC, the FCC imposed the much milder sanctions of small fines (\$10,000 or less) and/or short term, probationary license renewals for: (a) contemporaneous clipping of network advertising by another Las Vegas station (*Channel 13 of Las Vegas, Inc.*, 37 F.C.C.2d 518 (1972)); (b) contemporaneous willful issuance of false bills to non-network advertisers by yet another Las Vegas station (*Summa Corp.*, 38 F.C.C.2d 1160 (1973)); (c) subsequent and far more egregious clipping of network advertising by another NBC affiliate (*WEAU, Inc.*, 50 F.C.C.2d 659 (1975)); and (d) fraudulent billing in other cases set for hearing subsequent to KORK-TV (*Blackstone Broadcasting Corp.*, 52 F.C.C.2d 1106 (1975); *Bluegrass Broadcasting Co.*, 43 F.C.C.2d 990 (1973)).<sup>13</sup>

<sup>13</sup> A "short-term renewal" provides the FCC an opportunity to review the licensee's interim performance without waiting the usual three-year term. Absent interim misconduct, a short term renewal is invariably followed by a renewal for the balance of the normal full license term.

The ultimate sanction of nonrenewal for Western cannot be rationally explained, as the Court of Appeals suggested, by any notion of a "get tough" policy to improve licensee compliance. (App. 7a-8a). For, after the FCC decided Western's case, it returned to its pattern of imposing far milder sanctions for fraudulent billing. See *Empire Broadcasting Corp.*, 63 F.C.C.2d 634 (1977), and *Tupelo Broadcasting Co.*, 67 F.C.C.2d 1358 (1978), where there were larger amounts of over-billing, licensee failure to exercise adequate supervision or to take remedial action, and specific knowledge (not assumed "constructive" knowledge) of over-billing by station management.

As all of these other cases involved broadcast stations, the Court of Appeals made a serious mistake when it sought to dispose of Western's argument about analogous cases on the ground that it "reflects a misapprehension of the nature of a broadcast license." (App. 7a-8a). Moreover, when the FCC imposed a sanction on Western, there was no need to "get tough" to improve KORK-TV's compliance. All clipping at KORK-TV had been stopped about a year before hearing was ordered; throughout the four years of hearings there was no suggestion of repeated or different misconduct. Meaningful judicial review would insist on agency explanation why a lesser sanction than the regulatory death penalty would be ineffective to ensure future compliance by Western. See *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-169 (1962).<sup>14</sup>

<sup>14</sup> The Court of Appeals termed "groundless" Western's claim that "denial of renewal was unjust because the licensee had no notice [prior to mid-1971] that clipping [of other than advertising matter] would constitute fraudulent billing, or that it could result in nonrenewal." (App. 7a). Yet in *Hubbard Broadcasting*,

Although the Court of Appeals correctly noted that denial of renewal is not a novel sanction for proven misrepresentation (App. 8a), it overlooked that such a sanction has not been universally imposed. Thus, there is lacking the reasoned decisionmaking required to explain why Western was treated very harshly for *debatable* misrepresentation while others were treated much more leniently for unquestioned deliberate lying.

In *CBS, Inc.*, 69 F.C.C.2d 1082 (1978), a big and powerful network received the mere wrist slap of a short-term renewal for one of its stations even though top network officers had repeatedly lied to the FCC about programs that had deceived the public across the Nation and had violated both the Communications Act and FCC rules.<sup>15</sup> *Microband Corp. of America*, 44 P&F Radio Reg.2d 1490 (1978), excused repeated false statements to the FCC and took into account

"the fact that Lipper [a Microband principal] acted on the advice of counsel and that the practice which constituted fraud was endemic in the financial community and had not been judicially determined to be illegal when Lipper's . . . actions occurred." 44 P&F Radio Reg.2d at 1494 n.5.

The FCC also considered in *Microband*, but refused to consider here, the absence of any recurrent misconduct

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*supra*, only the much more lenient sanction of a short term renewal was imposed on a licensee who had clipped network "clutter" and "program content" as late as April, 1973, some two years after KORK-TV had stopped any clipping, because "at the time the irregularities occurred, there was no clear Commission policy prohibiting the particular style of clipping." 41 P&F Radio Reg.2d at 986 (emphasis added).

<sup>15</sup> "CBS apparently lacks adequate controls to insure that high level officers responsible for network operations do not misrepresent facts to the Commission." 69 F.C.C.2d at 1091.

and the licensee's role as a "positive force in the development" of telecommunications.

*Defenses and mitigating factors.* The Court of Appeals failed to require the FCC to explain rationally why it had ignored or rejected Western's many defenses and claims in mitigation when identical defenses and claims had been held decisionally significant in other cases. The Court of Appeals, without a word of explanation, acquiesced in FCC refusal to consider or to credit:

(a) Western's reliance on expert former counsel to negate any inference of the bad faith, or intent to mislead or hold back information, necessary to sustain a misrepresentation/lack of candor finding;<sup>16</sup>

(b) the absence of *scienter*, which should have precluded any fraudulent billing finding because the FCC's rule requires "the knowing issuance of false information concerning amounts actually charged for advertising," *Blackstone Broadcasting*, 52 F.C.C.2d at 1108 (emphasis in original);<sup>17</sup>

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<sup>16</sup> Compare FCC precedent: *Ultravision Broadcasting Co.*, 11 F.C.C.2d 394, 406-07 (Rev. Bd. 1968), *aff'd*, *WEBC v. FCC*, 136 U.S. App. D.C. 316, 325-26, 420 F.2d 158, 167-68 (1969); *Lycoming County Broadcasting Co.*, 13 F.C.C. 127, 136-38 (1948); *see also Microband Corp. of America, supra*; *L. B. Wilson, Inc.*, 37 F.C.C. 511, 597 (1964); *Bay Broadcasters, Inc.*, 34 F.C.C.2d 138 (1972). Compare judicial precedent: *Williamson v. United States*, 207 U.S. 425, 453 (1908) (fraudulent concealment in bankruptcy); *United States v. Phillips*, 217 F.2d 435, 442 (7th Cir. 1954) (tax evasion); *Haywood Lumber & Mining Co. v. Commissioner*, 178 F.2d 769, 771 (2d Cir. 1950) (failure to file tax returns).

<sup>17</sup> There is no reason KORK-TV's general managers should have known that network reports were false as to *advertising*, even though they knew that clutter was being clipped. The station's policies and practices were to avoid commercial clipping, but if it

(c) restitution, which has been accepted as a mitigating factor demonstrating contrition, good faith and willingness and ability to try to do better;<sup>18</sup> and

(d) other corrective and preventive action taken by Western—eliminating questionable practices, instituting new billing safeguards, and employing a special supervisor to ensure FCC rule compliance.<sup>19</sup>

While the FCC may not be bound “to deal with all cases at all times as it has dealt with some that seem comparable,” *FCC v. WOKO, Inc.*, 329 U.S. 223, 228 (1946), requirements of reasoned decisionmaking at least dictated that the Court of Appeals insist that the

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did occur, to prepare “discrepancy reports” as a check against overbilling. Moreover, undisputed evidence showed that operators could clip clutter without interfering with NBC commercials, and the FCC itself has held that extensive clutter clipping need not necessarily interfere with network advertising or program content. *Hubbard Broadcasting, supra*.

<sup>18</sup> Compare *Empire Broadcasting, supra*; *Booth American Co.*, 58 F.C.C.2d 553, 554-55 (1976); *Coaxial Communications, Inc.*, 61 F.C.C.2d 81, 94-95 (1976); *Bluegrass Broadcasting, supra*; *Star Stations of Indiana, Inc.*, 19 F.C.C.2d 991, 993 (1969). The FCC said Western was dilatory in making its restitution showing (App. 21a n.7), but Western acted much earlier than the renewal applicant in *Star Stations*. Also Western’s restitution of \$325 (for all overbilling that might be inferred from evidence in the record) was made before the hearing sessions even began. (App. 73a).

<sup>19</sup> Compare *CBS, supra*; *Empire Broadcasting, supra*; *Blackstone Broadcasting, supra*; *WEAU, Inc., supra*; *Action Radio, Inc.*, 51 F.C.C.2d 803 (1975); *Booth American, supra*; *Belk Broadcasting Co. of Florida*, 42 F.C.C.2d 844, 849 (1973). See also *Continental Broadcasting, Inc. v. FCC*, 142 U.S. App. D.C. 70, 73-74, 439 F.2d 580, 583-84, cert. denied, 403 U.S. 905 (1971), noting the FCC’s careful consideration of a renewal applicant’s corrective action—a consideration never given Western here.

FCC articulate rational reasons for its grossly disparate treatment of Western in terms of available defenses, mitigating factors, and sanction. *Melody Music* was decided after *WOKO* and distinguished it. If the Court of Appeals intended to overrule or repudiate the well established and frequently followed *Melody Music* doctrine in Western’s appeal, at least it had the duty to face the issue squarely and to articulate rational reasons for doing so.

This Court should not acquiesce in any doctrine, such as that implicitly sanctioned by the Court of Appeals below, that would permit the FCC (and other agencies) unbridled discretion in dealing with its licensees and in fashioning remedies for their conduct. If the decision of the Court of Appeals stands, the FCC (and other agencies) will be effectively exempt from any meaningful requirement of rational consistency in defining (a) sanctionable offenses, (b) acceptable defenses and mitigating factors, and (c) fair, just and appropriate sanctions.

The apparent new “standard of no standard” fashioned for Western’s case by the FCC, and approved by the Court of Appeals, is mischievous. Under it, applicants in renewal or revocation hearings seeking to establish their basic qualifications could be held to different standards of conduct, allowed different defenses, and subjected to different treatment or degrees of punishment for reasons no more cogent than when their case comes up, who they may be, where they may be located, what they may own, or what they may believe and say. Particularly when broadcast licensees are involved, who provide “a principal source of information and entertainment for a great part of the Nation’s population,” *United States v. Southwestern*

*Cable Co.*, 392 U.S. 157, 177 (1968), the potential for mischief is too enormous to go unreviewed by this Court.

Two of the three grounds given by the Court of Appeals for not requiring rational FCC explanations for the disparity of sanction beg the issue.<sup>20</sup> First, the fact that Western has no "property interest" in its license, plus the fact that renewal depends on proof "that past service has been in the public interest and that future service will likely be superior to that offered by competing applicants" (App. 8a), does not extinguish the requirement of reasoned decisionmaking.<sup>21</sup> This reference by the Court of Appeals is baffling, for the FCC refused to credit Reynolds' 25-year unblemished record as a licensee or KORK-TV's exemplary public service, even though such is said to be the "best evidence" of a renewal applicant's future performance. *E.g.*, *Central Florida Enterprises, Inc. v. FCC*, No. 76-1742, slip op. at 31 (D.C. Cir. Sept. 25, 1978). Second, that misrepresentation "is a valid basis for non-renewal" (App. 8a) is no substitute for judicial insistence that the FCC explain why nonrenewal was necessary and appropriate here, but not in *CBS* and *Microband*, for example.

<sup>20</sup> Western cannot explain to this Court why the Court of Appeals would give such short shrift to this issue below after repeatedly requiring agency explanations for departure from precedent and for disparate sanctions in other cases. See, e.g., *Melody Music, Inc. v. FCC*, *supra*; *Columbia Broadcasting, Inc. v. FCC*, 147 U.S. App. D.C. 175, 454 F.2d 1018 (1971); *Nassar and Co. v. SEC*, 185 U.S. App. D.C. 125, 566 F.2d 790 (1977); and *Garrett v. FCC*, 168 U.S. App. D.C. 266, 513 F.2d 1056 (1975).

<sup>21</sup> Even discretion involving privileges and gratuities should not be uncontrolled. K. Davis, *Discretionary Justice* 172-80 (1969).

The Court of Appeals' third ground—that "courts ordinarily accord the Commission particular discretion in fashioning remedies to maximize compliance with Commission policy" (App. 8a)—raises fundamental questions about the proper role of judicial review, particularly in the face of greatly disparate agency sanctions. The Administrative Procedure Act, 5 U.S.C. § 557(c)(3)(A), requires agency "reasons" for action in adjudicatory cases. This Court has held that an agency has a "duty to explain its departure from prior norms." *Atchison, T. & S.F.R. Co. v. Wichita Board of Trade*, 412 U.S. 800, 808 (1973) (plurality opinion). It seems to be seriously in error for *FCC v. WOKO*, *supra*, and *Butz v. Glover Livestock Commission*, 411 U.S. 182 (1973), which did uphold agency discretion in choosing sanctions, to be interpreted to mean, as the Court of Appeals has implicitly held here, that agency discretion in the selection of sanction is free of any requirement of "reasons" and explanations for disparate treatment, no matter how gross the disparity.

Professor Davis has put it well: a choice must be made between "the arbitrariness of uncontrolled and unguided discretion, and discretion that is structured and guided by a system of precedents and checked by a system of judicial review."<sup>22</sup> Unexplained and incom-

<sup>22</sup> K. Davis, *Administrative Law of the Seventies*, § 16.00-6 at 395 (1976). Professor Davis has been most outspoken on the need for agency explanations for disparate sanctions and in his criticism of *Butz v. Glover Livestock Commission*, even though that case did not fall under the "reasons" requirement of 5 U.S.C. § 557(c)(3)(A) and even though the Court never reached the question of the need for agency reasons to justify disparate treatment. See, e.g., *Administrative Law of the Seventies*, §§ 16.00, 16.00-6 & 17.07-4; Davis, *Revising the Administrative Procedure Act*, 29 Admin. L. Rev. 35, 50-52 (1977). *Butz* also involved only a 20-day suspension.

pletely or superficially reviewed agency discretion invites abuse. If the FCC (or any agency) is not required to give reasons for grossly disparate sanctions, the door will be open to *sub silentio* punishment of broadcasters (or other federal license holders) "upon the basis of their political, economic or social views, or upon any other capricious basis" wholly beyond the agency's authority. *National Broadcasting Co. v. United States*, 319 U.S. 190, 226 (1943).<sup>23</sup>

Nonrenewal for Western strongly suggests agency caprice. The typical justification for nonrenewal on so-called "character" grounds is that the licensee no longer merits a public trusteeship.<sup>24</sup> That justification was preempted here when the FCC expressly refused to impute alleged misrepresentation or fraud at KORK-TV to Reynolds, the ultimate licensee, as he did not participate in, or have knowledge of, any alleged misconduct at KORK-TV. *Donald W. Reynolds*, 65 F.C.C.2d 451 (1977). After having stripped Reynolds of KORK-TV, the FCC turned right around and demonstrated complete trust in his capacity as licensee and public trustee by authorizing renewal of all his

<sup>23</sup> "Reasoned decision promotes results in the public interest by requiring the agency to focus on the values served by its decision, and hence releasing the clutch of unconscious preference and irrelevant prejudice." *Greater Boston Television Corp. v. FCC*, 143 U.S. App. D.C. 383, 394, 444 F.2d 841, 852 (1970), *cert. denied*, 403 U.S. 923 (1971) (footnote omitted).

<sup>24</sup> *E.g.*, *FCC v. WOKO*, *supra*, 329 U.S. at 228-29; *Hall v. FCC*, 99 U.S. App. D.C. 86, 96, 237 F.2d 567, 577 (1956); *Melody Music, Inc.*, 2 F.C.C.2d 958, 960 (1966).

other licenses! There can be no rational implication that Reynolds is unreliable or unfit.<sup>25</sup>

Apart from the overall public importance of the issue of judicial review of grossly disparate agency sanctions, there is an apparent conflict on this issue between the District of Columbia Circuit and the Second Circuit. *Arthur Lipper Corp. v. SEC*, 547 F.2d 171 (2d Cir. 1976), *rehearing denied*, 551 F.2d 915 (1977), *cert. denied*, 434 U.S. 1009 (1978), held that agency sanctions are "reviewable as to severity."<sup>26</sup> It thereupon reduced an equivalent denial of authority to continue to do business in a regulated industry (revocation of a broker-dealer registration) on several grounds, all of which are present here: widespread prevalence of the challenged conduct in the industry; reliance on counsel; pendency of the proceeding for a long time; the cloud over petitioners' heads; and the "tremendous disparity" in sanctions imposed in other comparable cases. 547 F.2d at 183-85. Resolution of this conflict on an important legal principle is necessary to promote consistency of government regulation of those holding federal authorizations to engage in various endeavors.

<sup>25</sup> The FCC's theory that Reynolds should lose his KORK-TV license for failure to exercise adequate control and supervision (App. 32a-34a) likewise cannot be squared with renewal of his other licenses. He exercised precisely the same "control and supervision" at all his stations. Moreover, his unblemished 25-year record as a broadcaster and his record of public service at KORK-TV were more indicative of the adequacy of his "control and supervision" of KORK-TV than the isolated aberration that led to this case.

<sup>26</sup> A conflict between circuits in FCC licensing cases is not possible because 47 U.S.C. § 402(b) vests exclusive jurisdiction over such cases in the District of Columbia Circuit.

3. This Court Should Settle The Important Federal Question. Which It Has Not Heretofore Decided. Whether There Is Violation Of An Applicant's Right To A Fair Adjudicatory Agency Hearing When There Is Premature Disclosure Of Tentative Agency Decisions And Related Ex Parte Conduct In Violation Of Specific Agency Rules: The Proceedings Below So Far Departed From The Accepted And Usual Course As To Call For Exercise Of This Court's Power Of Oversight.

The Court of Appeals, like the FCC, found the leak episodes "unfortunate," but did not perceive any prejudice to Western or denial of its rights. (App. 6a). This Court has a special role in assuring the integrity of the overall administrative/judicial process and the fair conduct of all adjudications (both in fact and appearance) consistent with pertinent rules. Therefore, the Court should resolve the leak question to guide all involved in federal agency adjudications. The prevalence of FCC leaks, and the prospects for leaks at other agencies, makes this a matter of broad legal importance in the administration of justice.

Leaks violate basic ethics of the decisionmaking process. *See, e.g.,* ABA Code of Judicial Conduct, Canon 3(A)(6) (1972). The FCC long has had a leak problem.<sup>27</sup> It has conceded that leaks in restricted adjudicatory proceedings are inconsistent with proper judicial conduct and decorum. *TelePrompter Cable Systems, Inc.*, 52 F.C.C.2d 1263, 1272-73 (1975), *rev'd on other grounds*, 178 U.S. App. D.C. 66, 543 F.2d 1379 (1976). So far the FCC has done little about the prob-

<sup>27</sup> See FCC Monitoring of Employees' Telephones: Hearings Before the Special Subcomm. on Investigations of the House Comm. on Interstate and Foreign Commerce, 92nd Cong., 2d Sess. 40 (1972).

lem. Under the rulings below, parties to administrative proceedings tainted by this kind of misconduct are left without recourse unless they can do the impossible—prove that there would have been a different result but for the agency's misconduct.

A party to an agency adjudicatory proceeding has an identifiable interest in the integrity of the deliberative process and its untainted conduct in accordance with published rules. This interest is entitled to protection against actions that disrupt orderly processes, risk inhibiting the exchange of views, invite improper influences to be brought to bear on the decisionmaking process (such as reporters harassing FCC Commissioners and their assistants to find out how and why they voted), and violate fundamental precepts of judicial conduct.

This Court is well aware of the need for secrecy of deliberations. Mr. Justice Clark's observations about the Court's Friday conferences are no less applicable to FCC post-oral argument meetings to discuss tentative decisions:

"The Court must carry on these Friday conferences in absolute secrecy, otherwise its judgments might become prematurely known and the whole process of decision destroyed. We therefore guard its secrets closely. *There must be no leak.*"<sup>28</sup>

As Mr. Justice Rehnquist has put it, a closed conference

"... permits a remarkably candid exchange of views among the members of the Conference. This

<sup>28</sup> *The Supreme Court Conference*, address of Mr. Justice Clark before the A.B.A. Section of Judicial Administration, August 27, 1956, reprinted in 19 F.R.D. 303, 305 (1956) (emphasis added).

candor undoubtedly advances the purposes of the Conference in resolving the cases before it. No one feels at all inhibited by the possibility that any of his remarks will be quoted outside of the Conference Room, or that any of his half formed or ill conceived ideas, which all of us have at times, will be later held up to public ridicule.

\* \* \*

"We all occasionally change our tentative vote at the Conference . . . Should the public, or any invested segment thereof, know the tentative vote, lobbying pressures intended to change, or affect, that outcome could result. Yet such external pressures are, at least in part, a questionable influence on the workings of a judicial branch."<sup>29</sup>

Neither the Court of Appeals nor the FCC recognized the *inherent* prejudice to Western of the leaks.<sup>30</sup> The right to "[a] fair trial in a fair tribunal," *In re Murchison*, 349 U.S. 133, 136 (1955), is not achieved by mere avoidance of obvious prejudice or bias. Fairness requires procedures that avoid the risk that some extraneous factor will tilt the decisionmaking balance, cf. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927), and that avoid any appearance of unfairness. *Offutt v. United States*, 348 U.S. 11, 14 (1954). It is "imperative" in adjudicatory proceedings that "agencies use the pro-

<sup>29</sup> *Sunshine in the Third Branch*, 16 Washburn L.J. 559, 565-66 (1977) (emphasis added). See also Mr. Justice Brennan, Working at Justice, in *An Autobiography of the Supreme Court* 300 (A. Westin ed. 1963); Mr. Justice Frankfurter, *Mr. Justice Roberts*, 104 U. Pa. L. Rev. 311, 313 (1955).

<sup>30</sup> The FCC reached its "no prejudice" conclusion before any investigation. The Court of Appeals' conclusion that no "infringement of due process" had been established "on this record" proves little in view of the paucity of the record Western was allowed to make on the point.

cedures which have traditionally been associated with the judicial process." *Hannah v. Larche*, 363 U.S. 420, 442 (1960).

Like members of any adjudicatory tribunal, FCC Commissioners should be free to change their minds after tentative votes. Leaks of tentative decisions tend to chill the deliberative process and the free exchange of views between decisionmakers. They also tend to "lock-in" the tentative decision. Cf. *Cinderella Career and Finishing Schools, Inc. v. FTC*, 138 U.S. App. D.C. 152, 159, 425 F.2d 583, 590 (1970). Potential "chilling" or "locking in" is inherently unfair, depriving parties of the full consideration their arguments and interests deserve. Other possibilities for prejudice from leaks stem from the motives for them, such as have been enumerated by a former FCC insider familiar with the problem: (a) to further the leaker's objectives; (b) to make the leaker's "own actions appear more acceptable to others on the Commission . . ."; and (c) to "try to force a colleague's hand on a matter they consider important."<sup>31</sup> Such hindrances to the deliberative process are not compatible with our system of justice and concepts of due process.<sup>32</sup>

<sup>31</sup> Cole and Oettinger, *Reluctant Regulators: The FCC and the Broadcast Audience* 60 (1978).

<sup>32</sup> Harm to the *ongoing, still tentative deliberative process* readily distinguishes this case from the alleged leaks of action on petitions for writ of certiorari in *United States v. Haldeman*, 181 U.S. App. D.C. 254, 559 F.2d 31 (1976), *cert. denied*, 431 U.S. 933, *rehearing denied*, 433 U.S. 966 (1977). Votes in conference on certiorari are usually not tentative and come at the *end of the deliberative process*. Orders on certiorari are usually published on the Monday after the Friday conference at which the vote is taken. Leaks in that con-

That the FCC could have followed a practice of announcing decisions prior to formal release as in *Eastern Air Lines v. CAB*, 271 F.2d 752 (2d Cir. 1959), *cert. denied*, 362 U.S. 970 (1960), does not dilute the importance of this issue. Most agencies do not follow such a practice.<sup>33</sup> Moreover, the conduct upheld in *Eastern* did not pose the same threat to the decision-making process as the leaks in this case. In *Eastern*, there was no contention "that the interval between the completion of oral argument and the [CAB's] tentative decision [two months] was so short that it precluded thoughtful consideration of the evidence presented." 271 F.2d at 758. Here the interval between oral argument and tentative decision was *only minutes* so that, *prima facie*, the required "thoughtful consideration of the evidence" (presented over nearly four years of hearings) was precluded.

Western does not claim that any leak is reversible error. But if the decision below stands, no such agency misconduct would seem to entitle a party to an adjudicatory proceeding to any remedy *unless* it could prove the impossible—that there would have been a different

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text, as undesirable as they are, do not interfere with the deliberative process, the exchange of views, the drafting of opinions, or the change in tentative positions brought about by opinions that "will not write." Here, by contrast, the first leaks occurred almost immediately after the FCC's first conference which resolved only part of the Western-Valley case, and were published within less than a week of a tentative vote taken only minutes after oral argument. This was at the *beginning of the deliberative process*, which should have been kept free of interference until concluded by release of a finished opinion. What should have been four months of calm, secret deliberation, proved to be something quite different.

<sup>33</sup> The FCC abandoned its former practice of this type.

result without the leak. That seems inconsistent with basic notions of a due process right to untainted and unhindered deliberations over important adjudicatory matters. Particularly where, as here, the sanction resulting from the adjudication is so severe, there should be no taint or appearance of taint. Remedy for the FCC's error in handling the present case could be fashioned by remand to the agency for reargument on the merits. Only three of the seven Commissioners who heard the original oral argument and were present during the leak episode remain at the agency. Such a remand should also provide an opportunity, prior to further oral argument, for full and impartial investigation of precisely what occurred during the original deliberative process to determine whether recusals by hold-over Commissioners may be required. *See, e.g., Sangamon Valley Television Corp. v. FCC*, 106 U.S. App. D.C. 30, 269 F.2d 221 (1959).

**4. In Valley's Case The Court Of Appeals Decided An Important Question Of The Financial Qualifications Requirements Of The Communications Act Of 1934, As Amended, In A Way In Conflict With Applicable Decisions Of This Court.**

In marked contrast to its silence or extreme brevity on important issues presented in Western's appeal, the Court of Appeals undertook extensive *de novo* review in Valley's appeal and then substituted its judgment for that of the FCC on Valley's financial qualifications. The Court of Appeals thus exceeded the bounds of judicial review prescribed by the Administrative Procedure Act and proceeded in conflict with decisions of this Court. In the process a fundamental statutory prerequisite of broadcast licensing was jeopardized. Western has an important stake in whether

Valley erroneously has been saved from disqualification by the Court of Appeals. If Western is found ultimately to be qualified, it would face comparative hearing with Valley, if Valley is also found qualified.<sup>34</sup>

Sections 308(b) and 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 308(b), 309(a), require the FCC to determine that Valley possesses the necessary financial qualifications before its application can be granted. *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940). The Congress left it to the FCC to devise standards for measuring financial qualifications under the broad statutory requirement. The FCC devised such standards for bank loans, applied them to Valley's application, and found Valley deficient. Therefore, the scope of judicial review in Valley's appeal should have been extremely narrow. *Atlantic Refining Co. v. FTC*, 391 U.S. 357, 367-68 (1965); *SEC v. New England Electric System*, 390 U.S. 207, 211 (1968). See also the Administrative Procedure Act, 5 U.S.C. § 706(2)(E).

The Court of Appeals should have used particular restraint not to substitute its perception of the public interest in financial qualifications for that of the FCC, particularly where, as here, the FCC's standards and practices for assessing the availability of critical bank loans have been long established and consistently ap-

<sup>34</sup> There is no contradiction between (a) Western's argument that, as to Valley's appeal, the Court of Appeals should not have substituted its judgment for the FCC's concerning compliance with established standards to implement statutory requirements, and (b) Western's argument that, as to Western's appeal, the Court of Appeals should have insisted that the FCC at least explain and justify the disparate treatment of Western under standards that implemented other statutory requirements.

plied.<sup>35</sup> Instead, the Court of Appeals usurped the FCC's statutory role in a manner closely analogous to that severely criticized in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 809-15 (1978). See also *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 525 (1978), and *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 292 (1974), where Supreme Court review was warranted to determine if the Court of Appeals had misinterpreted the proper scope of its review. The Court of Appeals usurped the FCC's function apparently to achieve a result which the court deemed socially desirable: i.e., to permit Valley to try yet again to prove what it had failed to prove during four years of hearings—the availability of a large bank loan essential to its financial proposals. The Court of Appeals not only ordered the FCC to find Valley's original, but now expired, bank loan proposal acceptable; it also permitted Valley to relitigate its "complete financial qualifications." (App. 15a).

The financial qualifications requirements of the Communications Act are of substantial public importance and bear on thousands of broadcast stations. The essence of broadcasting is service to the public. Financial fitness is a prerequisite to providing meritorious service. *FCC v. Sanders Bros.*, 309 U.S. at 475. Licensing a frequency to a financially unqualified applicant risks waste of that scarce resource—e.g., construction may

<sup>35</sup> "Reasonable assurance" (or its semantic equivalent) has been the test for availability of proposed bank loans for years. See, e.g., *Crosby N. Boyd*, 57 F.C.C.2d 475, 488-89 (1976); *Lamar Life Broadcasting Co.*, 26 F.C.C.2d 932, 934 (Rev. Bd. 1970); *D. H. Overmyer Communications Co.*, 4 F.C.C.2d 496, 498-50 (Rev. Bd. 1966).

be delayed or never completed, or, if operations do commence, they may be hamstrung and of minimal value to the public. Displacement of a strong incumbent licensee (like Western) by a financially unqualified challenger (like Valley) compounds risks to the public interest by threatening loss or reduction of *existing* service.

The Court of Appeals appears to have introduced a bias of its own when it retailored the long-established financial qualifications requirement to avoid what it termed "pro-incumbent bias in comparative hearings." (App. 10a). The Court of Appeals both overlooked the basic, noncomparative nature of the financial qualifications issue and misconceived the fundamental public interests at stake in comparative renewal proceedings. *Cf. FCC v. National Citizens Committee for Broadcasting*, 436 U.S. at 780-83, 809-14. This has broad implications for the scheme of broadcast licensing generally. The public is ill-served by judicial bending of long-standing FCC qualifications standards to facilitate entry of financially strapped applicants into the highly competitive world of modern television.

The Court of Appeals held that Valley had established "reasonable assurance" that its proposed bank loan would be available. (App. 14a). The court overturned FCC reliance on substantial record evidence (a) that collateral was crucial to the bank, and (b) that "the assets of the station" would not, as the bank had originally assumed, be available as collateral. The court also overturned FCC findings that Valley had failed to prove that the bank would not require more collateral than Valley could substitute, "or, if collateral is required, what it will be and that Valley can provide it." (App. 140a). The Court of Appeals merely relied on "evidence" which it thought should have caused the

FCC to reach a different result. Even if the Court of Appeals had not misapprehended the record evidence,<sup>36</sup> its overturning of FCC conclusions that were based on substantial record evidence violated the rule of *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951). *See* Wright, C.J., dissenting in part. (App. 16a).

### CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 5, 1979

<sup>36</sup> The Court of Appeals mistakenly assumed that the FCC had "adopted" the ALJ's interpretation that two of three crucial interrogatories to the bank contained no more than "routine reservations." On that basis the Court concluded it was illogical for the FCC to rely solely on the one remaining interrogatory to find Valley unqualified. (App. 13a). However, the FCC *rejected* the ALJ's interpretation and found instead that "[t]he answers to the interrogatories were not routine reservations as argued by Valley, but constitute rather a statement that the bank may revise its collateral requirements at the time the loan is requested if it believes the security offered is inadequate." (App. 38a, emphasis added). The FCC's disagreement with the ALJ on this point was re-emphasized in its reconsideration decision. (App. 59a n.3).

## **APPENDIX**

**APPENDIX A**

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 76-2104

LAS VEGAS VALLEY BROADCASTING CO., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

WESTERN COMMUNICATIONS, INC., INTERVENOR

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No. 76-2124

WESTERN COMMUNICATIONS, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

LAS VEGAS VALLEY BROADCASTING CO., INTERVENOR

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Appeals from Orders of the  
Federal Communications Commission

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Argued February 22, 1978

Decided October 26, 1978

Judgment entered  
this date  
←

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

*Edgar F. Czarra, Jr.* with whom *Michael S. Horne*, *Joseph Volpe, III* and *Douglas E. Winter* were on the brief for appellant in No. 76-2124 and intervenor in No. 76-2104.

*Robert T. Murphy*, for appellant in No. 76-2104. *Edward P. Morgan* and *Joseph M. Morrissey* were on the brief, for appellant in No. 76-2104 and intervenor in No. 76-2124.

*C. Grey Pash, Jr.*, Counsel, Federal Communications Commission with whom *Lawrence W. Secrest*, Acting General Counsel, *Daniel M. Armstrong*, Associate General Counsel, and *Thomas R. King, Jr.*, Counsel, Federal Communications Commission were on the brief, for appellee.

Also *Werner K. Hartenberger* and *Raymond L. Strassburger*, Attorneys, Federal Communications Commission entered appearances for appellee.

Before: WRIGHT, *Chief Judge*, and BAZELON and WILKEY, *Circuit Judges*

Opinion for the Court filed by *Circuit Judge* BAZELON.

Opinion filed by *Chief Judge* WRIGHT, concurring in part and dissenting in part.

BAZELON, *Circuit Judge*: The Federal Communications Commission (FCC) denied applications of appellants in these cases for a television broadcast license for Channel 3 in Las Vegas, Nevada.<sup>1</sup> In No. 76-2124, Western Communications, Inc. (Western), the incumbent licensee at KORK-TV, appeals the Commission's finding that fraudulent billing practices and misrepresentation required

<sup>1</sup> The mutually exclusive applications were first set for hearing in 1972. *Western Communications, Inc.*, 35 F.C.C.2d 517 (1972); *Western Communications, Inc.*, 37 F.C.C.2d 266 (1972).

denial of its renewal application; in No. 76-2104, Las Vegas Valley Broadcasting Co. (Valley) disputes the Commission's conclusion that it was not financially qualified for the license. We affirm the FCC's order as to Western, but remand for further proceedings as to Valley's application.

# I. WESTERN

In the renewal proceeding, the Commission reviewed Western's apparent practice of "clipping" parts of network broadcasts to insert local advertising, thereby violating both FCC rules and the station's affiliation contract with the National Broadcasting Co. (NBC).<sup>2</sup> Although Western insists that it only clipped "clutter," described as network promotional announcements, the administrative law judge (ALJ) found that network commercials were frequently clipped, and that the licensee submitted inaccurate reports to the network on its practices.<sup>3</sup> As a result, NBC paid KORK for advertisements that either did not appear at all, or appeared only in

<sup>2</sup> The NBC contract established that KORK would not "without NBC's prior written authorization make any deletions from or additions to any program furnished to you hereunder. . . ." *Western Communications, Inc.*, 59 F.C.C.2d 1463, 1465 (1976) [hereinafter cited as Initial Decision]. Section 73.1205 of the Commission's rules, 47 C.F.R. § 73.1205 (1977), provides:

No Licensee . . . shall knowingly issue . . . any bill, invoice, affidavit or other document which contains false information . . . or which misrepresents the quantity of advertising actually broadcast (number or length of advertising messages) or . . . the time of day at which it was broadcast . . . .

<sup>3</sup> The number of commercials actually clipped has not been established, but there is ample evidence in the record that the practice was widespread at KORK. See text accompanying notes 10-14 *infra*.

part. The Commission affirmed the ALJ's initial decision,<sup>4</sup> finding a "gross disregard of the Commission's fraudulent billing rules, which reflects adversely on Western's qualifications to be a Commission licensee."<sup>5</sup>

The misrepresentation issue involves KORK's answers to four Commission inquiries in 1970-71, about the station's policy on inserting local commercials or other announcements in network programs.<sup>6</sup> KORK replied that any deletions of network material were due to error by individual personnel, not station policy. The ALJ thought the responses "form[ed] a pattern of attempting to mislead the Commission as to the station's commercial practices,"<sup>7</sup> and that KORK "as a matter of policy and practice was scheduling more local commercials than could be accommodated in the authorized break time."<sup>8</sup> The FCC again agreed, calling the licensee's responses to Commission inquiries "false, misleading and evasive," and "clearly designed to conceal its operating practices."<sup>9</sup>

Western claims that the Commission's denial of its renewal application (A) was not based on substantial evidence, (B) neglected valid defenses presented on Western's behalf, and (C) constituted an unjustifiably harsh sanction for conduct not clearly prohibited under prior Commission policy.

<sup>4</sup> Western Communications, Inc., 59 F.C.C.2d 1441 (1976) [hereinafter cited as Final Decision].

<sup>5</sup> Id. at 1444 (citation omitted).

<sup>6</sup> The FCC inquiries were prompted by viewer complaints about commercials disrupting telecasts of the World Series and various entertainment shows. J.A. 857-881 (No. 76-2124).

<sup>7</sup> Initial Decision, *supra* note 2, at 1474.

<sup>8</sup> Id.

<sup>9</sup> Final Decision, *supra* note 4, at 1449.

### A. Substantial Evidence

On the clipping issue, the factual record supports the Commission's conclusion that KORK substituted local material for network broadcasts.<sup>10</sup> The FCC Broadcast Bureau compared the operating logs of KORK and the Los Angeles NBC station for fifteen programs between October 4, 1970 and May 7, 1971, and concluded that KORK clipped at least part of 21 network commercials.<sup>11</sup> A similar study by Valley of a 28-week period indicated that approximately 250 commercials were clipped.<sup>12</sup> Although such log comparisons are subject to human error in record-keeping, a clear pattern emerges here. Moreover, KORK's own review of the period between 1968 and 1971 showed approximately 800 clipped network commercials,<sup>13</sup> and the station paid NBC \$7,763.02 for advertisements that it may not have carried.<sup>14</sup>

There is also substantial evidence in the record that Western's responses to Commission inquiries involved misrepresentations and lacked candor. The FCC opinion carefully traces Western's inaccurate characterizations of particular incidents and general practices.<sup>15</sup> Western would defend its responses on the ground that the FCC inquiries were imprecise, asking "as to all the circumstances" surrounding the insertion of "advertising in network programs . . . in such a manner as to affect

<sup>10</sup> Our standard of review under 47 U.S.C. § 402 (1970) requires that the Commission's findings be supported by substantial evidence.

<sup>11</sup> Initial Decision, *supra* note 2, at 1467.

<sup>12</sup> Id.

<sup>13</sup> J.A. 1310-39 (No. 76-2124).

<sup>14</sup> Final Decision, *supra* note 4, at 1443 n.7.

<sup>15</sup> Id. at 1446-49.

the program content.”<sup>16</sup> Whatever ambiguity may have been present in the Commission’s language, the central thrust of the questions was clear, and we see no basis here for disputing the Commission’s conclusion that Western’s responses contained both falsehoods and evasions.

### B. Defenses

Western asserts that non-renewal of its license was not justified because there was no proof that the licensee, Donald Reynolds, knew of KORK’s clipping practices. The record shows that two station managers appointed by Reynolds, both of whom were officers and directors of Western, knew of the clipping. It would be irrational to permit Reynolds, who holds several other broadcast licenses, to avoid responsibility for the acts of his officers. Such a course would both encourage lax station oversight by licensees and set “a different standard of conduct for a multiple or absentee owner than for a local owner.”<sup>17</sup>

Drawing an analogy to fairness problems resulting from *ex parte* contacts with decision makers, Western also suggests that “leaks” to the press after the FCC hearing prejudiced its case and denied it due process. Western contends that the leaks tended to “lock-in” the FCC’s tentative decision and disrupt the deliberative process.<sup>18</sup> Although premature revelation of a decision is unfortunate, we do not see how such an event relates to the *ex parte* question, nor can we identify, on this record, any infringement of due process resulting from such disclosure.

<sup>16</sup> *Id.* at 1447.

<sup>17</sup> *Id.* at 1450.

<sup>18</sup> Brief for Petitioner Western Communications, Inc., at 67.

### C. The Penalty

Western claims the denial of renewal was unjust because the licensee had no notice that clipping would constitute fraudulent billing, or that it could result in nonrenewal. This argument is groundless. Concern over the regularity of a licensee’s financial practices derives from the Communications Act’s requirement that the FCC consider an applicant’s “character,”<sup>19</sup> and from the “public interest” standard for broadcast regulation.<sup>20</sup> Since 1962, the Commission has issued several statements announcing a strong policy against fraudulent billing.<sup>21</sup> Indeed, a 1970 statement specifically noted as fraudulent any bill misrepresenting the length of the commercial as broadcast,<sup>22</sup> and an FCC rule adopted in 1965 prohibits billing “which misrepresents the quantity of advertising actually broadcast.”<sup>23</sup> Even without specific Commission prohibition of clipping, the practice would appear manifestly fraudulent. But in this situation, KORK’s contract with the network, the Commission’s 1970 statement, and the Commission’s rule all clearly barred clipping.

Finally, Western argues that even if the Commission’s findings of fraudulent billing practices were accurate, nonrenewal of the broadcast license was a disproportionately severe sanction, especially in light of less drastic penalties imposed by the Commission in arguably analogous cases. Western’s argument reflects a misapprehen-

<sup>19</sup> 47 U.S.C. §§ 308(b), 319(a) (1970).

<sup>20</sup> 47 U.S.C. § 309(a) (1970).

<sup>21</sup> *E.g.*, Applicability of Fraudulent Billing Rule, 1 F.C.C.2d 1075 (1965); Fraudulent Billing Practices, 23 F.C.C.2d 70, 72 (1970); Renewal or Revocation Hearing Proceedings in Future Fraudulent Billing Cases, 38 F.C.C.2d 1051 (1972); Fraudulent Billing Practices, 53 F.C.C.2d 900 (1975).

<sup>22</sup> 23 F.C.C.2d 70, 72 (1970).

<sup>23</sup> 47 C.F.R. § 73.1205 (1977).

sion of the nature of a broadcast license. "[A] broadcast frequency is not a homestead which after five years belongs to the settler. . . . Rather it belongs to the public . . . ." <sup>24</sup> Retention of a license hinges on a demonstration that past service has been in the public interest and that future service will likely be superior to that offered by competing applicants. <sup>25</sup> The Commission has held, and the courts affirmed, that misrepresentation of even immaterial facts is a valid basis for nonrenewal. <sup>26</sup> In addition, courts ordinarily accord the Commission particular discretion in fashioning remedies to maximize compliance with Commission policy. <sup>27</sup>

## II. VALLEY

The Commission found that Valley "established its qualifications to be a Commission licensee in all respects except its financial qualifications." <sup>28</sup> FCC practice, based

<sup>24</sup> *Crowder v. FCC*, 399 F.2d 569, 571 (D.C.Cir.), *cert. denied*, 393 U.S. 962 (1968).

<sup>25</sup> *Central Florida Enterprises, Inc. v. FCC*, No. 76-1742 (D.C.Cir., Sept. 25, 1978), at 3-7; *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1206-10 (D.C.Cir. 1971), *clarification granted*, 463 F.2d 822 (D.C.Cir. 1972); *Fidelity Television, Inc. v. FCC*, 515 F.2d 684, 705-17 (D.C.Cir.) (Bazelon, C.J.) (voting to grant rehearing en banc), *cert. denied*, 423 U.S. 926 (1975).

<sup>26</sup> *FCC v. WOKO, Inc.*, 329 U.S. 223, 226-27 (1946); *Independent Broadcasting Co. v. FCC*, 193 F.2d 900, 902 (D.C.Cir. 1951), *cert. denied*, 344 U.S. 837 (1952); *Crowder v. FCC*, *supra*, at 571.

<sup>27</sup> *FCC v. WOKO*, *supra*, at 228; *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 857 (D.C.Cir. 1970), *cert. denied sub nom. WHDH, Inc. v. FCC*, 403 U.S. 923 (1971); *Continental Broadcasting, Inc. v. FCC*, 439 F.2d 580, 583 (D.C.Cir.), *cert. denied*, 403 U.S. 905 (1971); *Lorain Journal Co. v. FCC*, 381 F.2d 824, 831 (D.C.Cir. 1965).

<sup>28</sup> Final Decision, *supra* note 4, at 1456.

on general statutory terms, <sup>29</sup> requires that license applicants have sufficient funds—in the form of paid-in capital, anticipated revenues, and loans—to cover costs through the first period of operation. <sup>30</sup> This requirement can be justified as insuring that scarce broadcast frequencies will be assigned to applicants who can maintain service on them, <sup>31</sup> and as excluding shoestring operations that might be more likely to resort to unethical or fraudulent practices to stay afloat.

Determining an applicant's financial qualifications, however, is an imprecise enterprise. For example, the Commission must gauge anticipated revenues of a prospective licensee despite changing economic conditions. Similarly, there can be no certainty that a bank will actually provide a proposed loan for a license applicant, or that the specified terms will be followed. A license application may not succeed for years, or at all; market factors may shift dramatically in the interim. Accordingly, the Commission requires only that a loan commitment letter establish a "reasonable assurance," not a binding legal certainty, that a loan will be available. <sup>32</sup> This approach is particularly appropriate because a commitment letter is the product of bargaining. The applicant, naturally, wants as strong a commitment letter as possible without

<sup>29</sup> 47 U.S.C. § 308(b) (Supp. V 1975) ("All applications for station licenses . . . shall set forth such facts as the Commission by regulation may prescribe as to the . . . financial . . . qualifications of the applicant"); 47 U.S.C. § 319(a) (Supp. V 1975) (same standard for construction permits).

<sup>30</sup> In this case, Valley had to demonstrate that sufficient funds were available to support it for three months without revenues. J.A. 161 (No. 76-2104).

<sup>31</sup> See *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940); *Graybar Electric Co. v. Doley*, 273 F.2d 284, 291 (4th Cir. 1959).

<sup>32</sup> *E.g.*, *Crosby N. Boyd*, 57 F.C.C.2d 475, 488-89 (1976); *Jay Sadow*, 39 F.C.C.2d 808, 810 (Rev. Bd. 1973).

conceding undue advantages in the form of higher interest rates or excessive collateral. The bank seeks to cement relations with a potential customer without specifying terms that may prove costly.

The reasonable assurance standard is also supported by the importance of avoiding a pro-incumbent bias in comparative hearings.<sup>33</sup> Since incumbent licensees need not establish financial qualifications, an unrealistically stringent standard for loan commitments to competing applicants would further entrench current license holders. In *Multi-State Communications, Inc. v. FCC*, No. 77-1440 (D.C. Cir. Oct. 4, 1978), this court ruled that the Commission held a loan commitment letter to an overly strict standard.

[I]f the need for additional information and further action could be said to render the bank letter worthless, then the Commission has in essence required a legally binding commitment at the same time that it professes to require something less.

*Id.* at 6.

At issue in this case are Valley's loan commitment letter and its ability to finance access to its proposed transmitter site.<sup>34</sup> We find insufficient support for the Commission's finding that its bank letter did not meet the

<sup>33</sup> See cases cited in note 25 *supra*.

<sup>34</sup> The ALJ also found that Valley was not assured network affiliation. Since the bank letter was contingent on such affiliation, Valley's financial prospects were even darker for the ALJ. Initial Decision, *supra* note 2, at 1503. The Commission reversed the ALJ on this question, finding that Valley would be a strong candidate for such affiliation since its audience coverage would be "superior to that of any existing Las Vegas station," and it would provide NBC with continuing channel identification as the successor to KORK. Final Decision, *supra* note 4, at 1451-52. We see no basis for disturbing the FCC's ruling on this point.

reasonable assurance standard, and remand for review of its overall financial qualifications.

#### A. *The Bank Loan Commitment Letter*

Valley's application relied on a \$1 million loan from the Nevada State Bank to pay for acquisition of land and broadcast equipment, with those assets to serve as collateral.<sup>35</sup> Valley then decided to lease its land and buildings and buy equipment on credit, with the equipment supplier holding the first lien on the machinery, so the bank modified its commitment in a subsequent letter.<sup>36</sup> The question of collateral under the revised terms was not resolved to the ALJ's satisfaction, and eleven interrogatories were served on the bank on this point. The bank's replies convinced the ALJ that the bank might require additional collateral for the loan, and thus that Valley "failed to carry its burden of proving that it is financially qualified to construct and operate its proposed station."<sup>37</sup> The Commission affirmed this ruling.<sup>38</sup>

The answers to the first two interrogatories established that the bank knew that Valley planned to buy equipment on credit and give the manufacturer an exclusive lien on the equipment. In view of this, the third question asked, did the bank "remain willing to make its proposed loan" as outlined in the commitment letters? The bank's answer was, "Yes."<sup>39</sup> Subsequent queries showed that the bank also knew that Valley planned to lease, not purchase, its facilities. The last three questions and answers were crucial:

<sup>35</sup> J.A. 356 (No. 76-2104).

<sup>36</sup> *Id.* at 357.

<sup>37</sup> Initial Decision, *supra* note 2, at 1506.

<sup>38</sup> Final Decision, *supra* note 4, at 1453.

<sup>39</sup> *Id.* at 1479.

9. Is Nevada State Bank willing to make the proposed \$1 million loan to Valley on the terms and conditions specified in the Colvin Smith letter of August 23, 1971, and the Samuel Lionel letter of February 22, 1973, if the collateral for the loan offered to the Bank by Valley does not include any land or buildings or any of the \$1,470,000 of broadcast technical equipment Valley proposes to purchase from RCA Corp., but includes only (a) all personal property of Valley which was not encumbered by credit agreements with RCA, (b) assignment of Valley's accounts receivable after it begins operations, (c) pledge of all outstanding capital stock of Valley without the stockholders giving up any voting rights; and (d) personal guarantees of all Valley stockholders?

Answer: If the conditions stated will in fact exist at the time the loan is required, Nevada State Bank will make the loan in accordance with the terms stated in the August 23, 1971 letter of Mr. Colvin Smith, Jr. and the February 22, 1973 letter of Samuel S. Lionel, if Nevada State Bank and its correspondent bank feel that those conditions, together with other conditions then existing make the loan a proper one.

10. Is the Nevada State Bank willing to loan Las Vegas Valley up to \$1,000,000 under the terms and conditions specified in the August 23, 1971, and February 22, 1973 letters if neither broadcasting equipment nor real property are available for collateral?

Answer: If the conditions stated will in fact exist at the time the loan is required, Nevada State Bank will make the loan in accordance with the terms stated in the August 23, 1971 letter of Mr. Colvin S. Smith, Jr. and the February 22, 1973 letter of

Samuel S. Lionel, if Nevada State Bank and its correspondent bank feel that those conditions, together with other conditions then existing make the loan a proper one.

11. In addition to the personal guarantees by Valley's stockholders, what is the minimum value of collateral that the bank will require in order to loan Valley up to \$1,000,000 as proposed?

Answer: It will depend upon the conditions existing at the time the loan is required.<sup>40</sup>

The ALJ characterized the answers to questions 9 and 10 as containing "routine reservations," but thought the bank's final answer introduced a fatal uncertainty into the bank's commitment.<sup>41</sup> As we read the record before us, this interpretation, as adopted by the Commission,<sup>42</sup> is without substantial support.<sup>43</sup>

The bank's identical responses to interrogatories 9 and 10 stated its willingness to go forward with the loan even if no land, buildings or broadcast equipment were available for collateral. The bank did reserve the right to reevaluate the commitment in light of future conditions, but this reservation did not bother the ALJ. In this context, it was illogical for Valley to be found unqualified on the basis of the answer to interrogatory 11, that the collateral required "will depend on the conditions

<sup>40</sup> *Id.* at 1479-80.

<sup>41</sup> Initial Decision, *supra* note 2, at 1504.

<sup>42</sup> Final Decision, *supra* note 4, at 1452-53.

<sup>43</sup> We note that all of the evidence on this issue involves written material, so there is no question of the credibility of a witness, a matter on which considerable deference would ordinarily be granted the finder of fact.

existing at the time the loan is required.”<sup>44</sup> The initial bank letter, which on its face satisfied the Commission, provided that the station’s assets would constitute the bank’s security for the loan. The bank knew that Valley’s change in financial plan reduced those assets, but the bank maintained its commitment to the loan. To require more of a license applicant would exceed the boundaries of the reasonable assurance standard.

### B. Site Access

Valley proposed to locate its transmitter on Black Mountain, near Las Vegas. Although the site is owned by the federal government, access is limited to two private roads: one controlled by the Bell Telephone Co. of Nevada and one owned by Alta Development Co., a company held in equal shares by Western, the incumbent licensee, and the Summa Corporation.<sup>45</sup> Valley purchased a right-of-way from the telephone company, but negotiations with Alta broke down. Even though Valley earmarked \$100,000 to acquire a right-of-way, Western said the selling price was \$190,000. In view of the uncertainty surrounding this issue, the ALJ ruled that Valley failed to meet its

<sup>44</sup> Initial Decision, *supra* note 2, at 1480.

A plausible explanation for the difference between the answer to interrogatory 11, and two previous answers, would focus on the form of the questions. The first two queries asked if the bank would make the loan in light of certain circumstances. The bank replied affirmatively, and stated its “routine reservations.” Interrogatory 11, however, asked directly about the collateral term. No greater uncertainty was introduced by the bank’s answer than already inhered in its two earlier answers. Only the affirmation of willingness to go forward, which was not the subject of the question, was absent.

<sup>45</sup> Valley would also have to acquire a permit from the Federal Bureau of Land Management, but the ALJ concluded that it would have no difficulty doing so. Initial Decision, *supra* note 2, at 1505.

burden of proof,<sup>46</sup> and the Commission agreed.<sup>47</sup> Although both the ALJ and the Commission recognized the difficulties of bargaining with a competing license applicant on a key matter, these difficulties were consequences of Valley’s own choice of transmitter sites.<sup>48</sup>

We are not advised whether the Commission believes that the site access problem, by itself, would warrant a finding of financial disqualification. We note that the financial dimensions of the site access issue are much more modest than the difficulties raised by the possible failure of the bank loan. Moreover, since the Nevada State Bank letter has expired by its own terms, Valley must present a new bank loan commitment to the Commission to establish its qualifications.<sup>49</sup> The impact of a future bank letter on Valley’s overall financial condition, including the site access situation, is uncertain. We do not foreclose Commission consideration of Valley’s complete financial qualifications.

Accordingly, the Commission’s order in No. 76-2124 is affirmed, and its order in No. 76-2104 is reversed and remanded.

*So ordered.*

<sup>46</sup> *Id.*

<sup>47</sup> Final Decision, *supra* note 4, at 1453-54.

<sup>48</sup> *Id.* at 1454; Initial Decision, *supra* note 2, at 1505.

<sup>49</sup> Western, as an Intervenor in No. 76-2104, contends that since Valley’s initial bank letter and a subsequent letter have both expired, this case is now moot. We note, however, that the Commission does not view the matter as moot, and that Valley remains a diligent litigant. Considering the business difficulties of maintaining a viable bank letter through a lengthy appeal, and the continuing impact of the Commission’s action on Valley’s attempt to win a broadcast license, we do not find a mootness problem. *Cf.* Arizona Public Service Co. v. FPC, 483 F.2d 1275, 1277-78 n.3 (D.C.Cir. 1973). Due to our decision on the Nevada State Bank letter, we do not reach Valley’s claim that the Commission erred in denying its petition to submit a subsequently obtained bank letter.

WRIGHT, *Chief Judge, concurring in part and dissenting in part*: I concur in the court's opinion affirming the Commission's order in No. 76-2124. Unlike the court here, I would also affirm the Commission's order in No. 76-2104. In that case the Commission found that Valley did not meet its statutory burden of proving it was financially qualified to construct and operate a television station.\* Rather than remand to allow Valley to remedy the defects the Commission found in its application *post hoc*, in my judgment the Commission should be directed to invite new applications for the license to be filed. *Compare Office of Communication of United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969).

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\* The Commission found, on substantial evidence, that Valley did not prove an essential \$1 million dollar bank loan would be available to finance the proposed station and did not show it could finance access to its proposed transmitter site.

## APPENDIX B

F.C.C. 76-625

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of:

Docket No. 19519

File No. BRCT-327

WESTERN COMMUNICATIONS, INC.

(KORK-TV), LAS VEGAS, NEVADA

For Renewal of License

Docket No. 19581

File No. BPCT-4465

LAS VEGAS VALLEY BROADCASTING CO.

LAS VEGAS, NEVADA

For Construction Permit for New Television  
Broadcast Station*Appearances*

*Edgar F. Czarra, Michael S. Horne and Joseph Volpe III* (Covington and Burling) on behalf of Western Communications, Inc.; *Edward P. Morgan, Gerald S. Rourke and Samuel M. Bradley* (Welch and Morgan) on behalf of Las Vegas Valley Broadcasting Co. and *W. K. Keane, P. W. Valicenti and Charles W. Kelley* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

**Decision**

(Adopted: June 30, 1976; Released: July 2, 1976)

BY THE COMMISSION: COMMISSIONER QUELLO ABSTAINING FROM VOTING AND ISSUING A STATEMENT.

1. This proceeding involves mutually exclusive applications filed by Western Communications Inc.<sup>1</sup> (Western) for renewal of its license for television station KORK-TV, Las Vegas, Nevada, and by Las Vegas Valley Broadcasting Co. (Valley), for a new television station at Las Vegas. In an Initial Decision, FCC 74D-37, released June 25, 1974, Administrative Law Judge Chester Naumowicz recommended the denial of both applications. He found that Western engaged in fraudulent billing in violation of Section 73.1205 of the Rules<sup>2</sup> and made material misrepresentations concerning its broadcast policies in its responses to Commission inquiries; and that Valley was not financially qualified to be a licensee because it failed to establish that it would be able to satisfy the bank's requirements for its loan commitment. He also found that Valley failed to show it could achieve access to its proposed transmitter site. Subsequent to the issuance of the Initial Decision, Valley's bank commitment letter expired. It then tendered

<sup>1</sup> Western Communications is a subsidiary of Donrey, Inc. Mr. Donald W. Reynolds, Sr., the sole owner of Donrey, also controlled Stations KOLO-TV, Reno, Nevada and KFSA-TV, Fort Smith, Arkansas.

<sup>2</sup> Section 73.1205 of the Rules provides in pertinent part that:

No licensee . . . shall knowingly issue . . . any bill, invoice, affidavit or other document which contains false information . . . which misrepresents the quantity of advertising actually broadcast (number or length of advertising messages) or the time of day or date at which it was broadcast. Licensees shall exercise reasonable diligence to see that their agents and employees do not issue any documents which would violate this section if issued by the licensee.

a new commitment letter for a larger amount from a different bank.

2. Now before the Commission for consideration are exceptions and supporting briefs filed October 29, 1974, by Western, by Valley, and by the Chief, Broadcast Bureau (Bureau), reply pleadings, filed December 2, 1974, by Western, by Valley,<sup>3</sup> and by the Bureau; a motion for leave to file supplement to brief and a supplement, both filed February 27, 1975, by Western, an opposition filed March 17, 1975, by Valley, an opposition filed March 17, 1975, by the Bureau, and a reply filed March 27, 1975, by Western; requests for official notice and leave to file a supplemental brief and a supplemental brief, all filed February 13, 1976, by Western, an opposition thereto filed February 25, 1976, by the Bureau, and comments filed March 2, 1976, by Valley; and various ancillary motions affecting the basic qualifications of both applicants.<sup>4</sup> Oral argument before the Commission, *en banc*, was held on March 9, 1976. Based on our review of the record, we find that the Judge's findings of fact accurately reflect the evidence of record and those findings and his conclusions of law are affirmed except as they may be modified by this Decision and by our rulings on exceptions as contained in Appendix A.

*Western's Qualifications***Fraudulent Billing**

3. The fraudulent billing issue concerns Western's charging NBC for network commercial announcements

<sup>3</sup> On December 2, 1974, Valley also filed a motion for authority to file a reply in excess of the page limitation which was opposed by Western in a pleading filed December 10, 1974. In view of the complexity of this proceeding Valley's motion will be granted.

<sup>4</sup> These pleadings are set forth in Appendix B.

which were not carried over station KORK-TV.<sup>5</sup> Western admits it engaged in clipping, i.e., it inserted local commercials into network transmission by extending network breaks leaving the network early or rejoining it late—but asserts that it only clipped clutter,<sup>6</sup> that the clipping was done in a manner which would not interfere with network commercials or substantive program content, and that there is no proof that any network commercials were clipped or that NBC was billed for commercials which were not carried.

4. Western sold commercials on the basis of extending network breaks and instructed its operators to telecast all commercials shown on the schedule. In order to confine the clipping to clutter, Western relied on the ability of its operators to predict what the network would telecast. However, the amount of clutter varied from program to program and there was no advance notice concerning when clutter would be telecast. Western's operators were thus faced with a heavy burden in attempting to confine the clipping to clutter and it was inevitable that both commercials and substantive program content would be clipped. Western anticipated that the clipping could affect viewer enjoyment and it instructed its operators to make their

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<sup>5</sup> Issues were also designated concerning fraudulent billing practices at stations KOLO-TV, Reno, Nevada, and KFSA-TV, Fort Smith, Arkansas, both of which were controlled by Western's principal, Mr. Donald W. Reynolds, Sr., and the impact of the fraudulent billing at those stations on Western's comparative qualifications. The Judge found that incidents of fraudulent billing resulting from clipping network transmissions occurred at both stations. However, since he found that Western was not qualified to be a licensee and he did not reach the comparative issue, the Judge drew no conclusions with respect to the significance of the fraudulent billing at stations KOLO-TV and KFSA-TV.

<sup>6</sup> Western asserts clutter consists of the opening and closing credits, the NBC peacock (no longer used), theme music, and network and program identifications and promotions.

returns to the network feed as unobtrusive as possible. As a result of its clipping practices, Western's operators would often wait until the end of a sentence or a commercial before rejoining the network. One Western operator described the task of attempting to accommodate clipping while minimizing interference by testifying that "you . . . flew by the seat of your pants."

5. Western's clipping of commercials was confirmed by a comparison of KORK-TV's logs with those of KNBC, Burbank, California, licensed to NBC. Western argues that the log comparisons are unreliable and as a result there is no evidence that any network commercials were clipped. The Judge recognized that the log comparisons constituted less than perfect evidence because of possible differences in station clocks or erroneous log entries. Nevertheless, he found, and we agree, that the logs establish with reasonable certainty that KORK-TV was off network for significantly longer periods than authorized and that as a general practice it clipped all or parts of network commercials in order to telecast local advertising. NBC and KNBC have a combined operation and they simultaneously submit programs to KORK-TV by computer. When KORK-TV and KNBC are hooked into the network they should be telecasting the same material. In several instances where the logs indicate that KORK-TV and KNBC initially joined network programs at the same time, the logs also show that KORK-TV left the network program before KNBC. Moreover, Western regularly expanded network breaks from 10 to 60 seconds beyond the time authorized and the logs indicate that on several occasions KORK-TV clipped entire commercials. Thus, the record affirms the Judge's finding that Western billed NBC for commercials which were not carried.<sup>7</sup>

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<sup>7</sup> Western compensated NBC \$324.20 for commercials which had been billed but were enumerated as clipped in the Bureau's bill of particulars. On February 27, 1975, ten months after the close of the

6. Western's contract with NBC requires it to carry all network commercials and to submit weekly reports supported by affidavits attesting that the affiant has read and is familiar with the weekly reports, that except as noted on the reports each program was telecast in its entirety including commercial messages and credits, and that any failure to telecast material included in the network feed was indicated in the reports. None of the station reports indicated any deletions from the network feed. During the 1968-71 license term, the network reports were verified by affidavits executed by KORK-TV's managers, Mr. Tabor and Mr. Ordonez. Also, during that period, Western's policy, as initiated by Mr. Tabor, was to sell advertising which would be telecast during unauthorized portions of the network feed. When Mr. Ordonez succeeded Mr. Tabor as KORK-TV's manager, he was told about the policy of clipping network transmissions. Mr. Ordonez was also instructed by Mr. Donald Reynolds, Jr., the son of Western's principal and supervisor of the Donrey, Inc. (Western's parent corporation) broadcast properties, to look into problems that KORK-TV was having because of its commercial practices. Moreover, as a result of viewer complaints, Mr. Tabor and Mr. Ordonez, who were officers and directors of Western, were given specific notice that the clipping of the network feed was interfering with the sub-

record, Western filed a motion to reopen the record to present evidence of its own log comparison and the fact that it compensated NBC \$7,438.82 for commercials billed but which may not have been carried. Western asserts that its study establishes that any billing problem was one of carelessness and it argues that the payments were made to demonstrate its good faith and that it had no obligation to reimburse NBC. The motion is opposed by Valley and the Bureau. The motion will be denied since it is dilatory and the matters alleged therein will not materially affect the outcome of this proceeding. The record establishes the fraudulent billing and we have consistently held that corrective action will not excuse prior violations. See, *Caribbean Broadcasting Corp.*, 22 FCC 2d 405 (1970); and *United States Transdynamics Corporation*, 21 FCC 2d 540 (1970).

stantive program content. Still, neither Mr. Tabor nor Mr. Ordonez took any steps to verify the information contained in the network reports and accompanying affidavits so that Western continued to bill NBC for commercials which were not carried.

7. Western argues that even if there was overbilling there was no intent by either Mr. Tabor or Mr. Ordonez to bill NBC for commercials not carried. It asserts that the overbilling constituted a small percentage of its total commercial load, and that the small amount of overbilling combined with the fact that there were some instances of underbilling, establishes that the overbilling resulted from carelessness. An intent to defraud, however, is not an essential element of a violation of Section 73.1205 of the Rules. A violation occurs when a licensee knowingly issues bills predicated on false information, *Blackstone Broadcasting Corp.*, 52 FCC 2d 1106 (1975), or is so derelict in the management of its station's affairs as to permit fraudulent billing. *United Broadcasting Co. of Florida, Inc.*, 55 FCC 2d 832 (1975). Here the record establishes that Mr. Tabor and Mr. Ordonez either knew or should have known that the network reports submitted to NBC were patently false. They knew that KORK-TV oversold commercials, they instructed their operators to be unobtrusive when rejoining network programs late, they were aware of complaints about commercial interference with network programs, and they executed erroneous affidavits indicating that all network programming was carried when they had ample notice that it was not.<sup>a</sup> It is clear that the alleged failure by Mr. Tabor and Mr. Ordonez to be aware of the fraudulent nature of the network reports establishes a lack of competence and diligence in their supervision over KORK-TV's affairs which contributed to the fraudulent

<sup>a</sup> The reports even omitted two extended periods in which KORK-TV was off the air for 17 minutes and 45 seconds and for 50 minutes.

billing and a gross disregard of the Commission's fraudulent billing rules, which reflects adversely on Western's qualifications to be a Commission licensee. *United Broadcasting Co. of Florida, Inc., supra.*

8. We also reject Western's contention that it lacked notice because "the fraudulent billing rule was not known to reach . . . network clipping," citing *Fraudulent Billing Practices*, 1 FCC 2d 1068 (1965), *recon. denied*, 2 FCC 2d 864 (1966). Although, when we adopted the fraudulent billing rule we did not refer to clipping *per se*, we did state that fraudulent billing could take many different forms, that the "rule is concerned with the principle involved rather than the form" of the fraudulent billing, and that the main ingredient in fraudulent billing is "the furnishing of false information concerning broadcast advertising" to induce any party to pay more for advertising than is actually due. *Fraudulent Billing Practices* at 1068. While it is true that the examples of fraudulent billing practices cited in *Fraudulent Billing Practices* did not include activities identical to KORK-TV's, the examples given cannot be construed as substitutes for Rule 73.1205. *Channel 13 of Las Vegas, Inc.*, 37 FCC 2d 518, 519 (1972). *Fraudulent Billing Practices* gave Western sufficient notice that it would be in violation of Rule 73.1205 if it furnished NBC with false affidavits and charged the network for commercials which were not carried.

9. We also find no merit in Western's arguments that denial of its application is not an appropriate sanction for violations of the fraudulent billing rules and is inconsistent with Commission precedent. Although we initially imposed monetary forfeitures for violations of the fraudulent billing rule, we subsequently found that "past sanctions [i.e., monetary forfeitures] have by no means accomplished their purpose" and that it would be appropriate to consider fraudulent billing in conjunction with an applicant's basic qualifications in renewal and revocation proceedings.

*Public Notice*, 38 FCC 2d 1051 (1972). Thereafter, fraudulent billing and violations of Section 73.1205 of the Rules were factors of decisional significance in the denial of several renewal applications, *Wharton Communications, Inc.*, 44 FCC 2d 489 (1973); *United Broadcasting Co. of Florida, Inc., supra*; and *Eastminster Broadcasting, Inc.*, FCC 76-156, released February 25, 1976. The cases Western cites in support of its position are not applicable here. *Bluegrass Broadcasting Co., Inc.*, 43 FCC 2d 990 (1973), involved fraudulent billing by the station's general manager who misled his employers as to the true facts in order to absolve himself of responsibility for any misdeeds. There was also an absence of complaints or other facts which would have alerted *Bluegrass's* principals to any wrongdoing. In contrast, Mr. Tabor and Mr. Ordonez, who were officers and directors of Western, participated in the fraudulent billing, and the viewer complaints and Commission correspondence should have alerted both Mr. Reynolds, Jr. and Mr. Reynolds, Sr., to the possibility of wrongdoing. In *Blackstone Broadcasting Corp.*, 52 FCC 2d 1106 (1975), we held that double billing, *per se*, was disqualifying conduct, but found mitigating circumstances in the limited scope of the fraudulent billing, the nominal amount of money involved, the fact that the licensee did not issue false affidavits, and the fact that there was no direct benefit from the double billing to the applicant. Moreover, our action in *Blackstone* was confined to the record of that proceeding and we clearly emphasized that a licensee who engages in fraudulent billing practices does so only at great risk, even without the presence of other improprieties. Given the protracted and flagrant fraudulent billing in this proceeding and Western's disregard for our fraudulent billing rule, *Blackstone* must be considered inapposite here. *United Broadcasting of Florida, Inc., supra*, at 840. In *Channel 13 of Las Vegas, Inc.*, 37 FCC 2d 518 (1972), we imposed a monetary forfeiture for clipping network programs. In that proceeding, however, there was

no evidence that any commercials were clipped or that the fraudulent billing was as extensive or as egregious as established by the record in this proceeding. Moreover, to hold that the fraudulent billing documented in the record of this proceeding is not disqualifying, would be an unwarranted departure from our decisions in more recent cases where we found the denial of renewal to be an appropriate sanction for protracted fraudulent billing, over an extended period of time, with the participation, knowledge or constructive knowledge of the licensee's top management.<sup>9</sup> See *Wharton, supra*; *United Broadcasting of Florida, Inc., supra*; and *Eastminster, supra*.

#### Misrepresentations

10. The misrepresentation issue evolved out of correspondence between the Commission and Western concerning viewer complaints about Western's clipping. In a letter dated October 29, 1970, the Commission wrote Western with respect to interference by local commercials with telecasts of the 1970 World Series. In a response, dated November 6, 1970, and signed by Western's former counsel,<sup>10</sup> Western asserted, *inter alia*, that the interference occurred because the network breaks required "the use of

<sup>9</sup> Western also cited the Initial Decision in *WEAU, Inc.*, 50 FCC 2d 659, which became final on January 8, 1975, without the filing of exceptions. In that proceeding the Judge found that the fraudulent billing was mitigated because the licensee's principal took immediate steps to eliminate clipping and fraudulent billing on discovery of the wrongdoing. In contrast, Western permitted the clipping and fraudulent billing to continue even after it received complaints and Commission correspondence about the wrongdoing. Moreover, the Initial Decision in *WEAU, Inc.*, is not a binding precedent because it became final without Commission review. *Finalization of Initial Decisions*, FCC 61-25, 20 RR 1141 (1961).

<sup>10</sup> Although counsel drafted each of the letters in question, all information contained in those letters was furnished by either Mr. Tabor or Mr. Ordóñez.

20-second announcements," that the program director was "severely reprimanded," that it was KORK-TV's policy to "limit the length of commercial announcements to the available break time," and that the interference with the World Series programming was an isolated incident.<sup>11</sup>

11. The November 6, 1970, letter contains misrepresentations and is lacking in the candor which we expect from our licensees. Western's explanation that the interference occurred because it used the two 30-second commercials when the use of 20-second commercials was required strains credibility when it is considered that the network in fact allowed for the use of only one 30-second commercial. Western argues that this was not a misrepresentation, citing Mr. Tabor's testimony that he believed the authorized duration of the network breaks was 42 seconds (which would allow time for two 20-second commercials and two seconds for leaving and rejoining the network). It is noted however that during five of the ten network breaks during the 1970 World Series, KORK-TV broadcast three 30-second commercials and during one other break four 30-second local commercials (although only three commercials were scheduled). The remaining four station breaks were expanded to include 60 seconds' worth of commercials. Western was thus scheduling commercials which would have exceeded the 42 seconds Mr. Tabor allegedly believed was available even if 20-second commercials were available, and we find there is ample justification for the Judge's finding that Western's explanation concerning the length of the commercials used during the World Series constituted a misrepresentation.

<sup>11</sup> The Judge asserted that in calling the interference an "isolated incident" Western was "hypocritical and false" because network breaks during all of the World Series games were overloaded. The November 6 letter in fact referred to all five 1970 World Series games.

12. Western's characterization of the World Series clipping as an "isolated incident" was also a significant misrepresentation. We accept Western's allegation that its November 6 letter referred to the clipping of all five 1970 World Series telecasts. The record, however, contains evidence that Western expanded network breaks on a regular basis by covering network transmissions with local commercials, that it also clipped the network feed to telecast commercials during the 1968 and 1971 World Series, and that its clipping interfered with other programs. Based on Western's policy of clipping and the problems emanating out of it, none of which were disclosed in the November 6 letter, the characterization of the interference with the World Series telecasts as an isolated incident was a factual misrepresentation designed to mislead the Commission with respect to Western's broadcast policies. Moreover, in view of Western's policy of clipping, it is clear that its statement that "It is the firm policy of KORK-TV to limit the length of commercial announcements to the available break time" is a blatant misrepresentation. We also note that although Western advised the Commission that the operator responsible for the clipping was severely reprimanded, Mr. Tabor testified: "I wouldn't necessarily say I severely reprimanded him." While the misstatement in the letter concerning the reprimand may, in and of itself, not be very serious, it indicates, when considered with Western's other statements and its broadcast policy, a casual attitude with respect to Commission inquiries which is unacceptable from a licensee. The foregoing representations, standing alone, would be sufficient grounds for the denial of Western's renewal application, *Nick J. Chaconas*, 28 FCC 2d 231 (1970). However, as will be shown, Western continued to misrepresent its commercial policies in its subsequent correspondence with the Commission.

13. On March 8, 1971, another viewer wrote the Commission concerning the telecast of local commercials which interfered with the "Laugh-In" program. In a letter dated

April 8, 1971, the Commission asked to be advised "as to all the circumstances" surrounding the interference, if Western inserted "advertising in network programs at other than the scheduled times in such a manner as to affect the program content," and whether Western's policy was to "insert commercial or other material in programs, join them late or leave them early with such effect." In a letter dated April 21, 1971, Western asserted that its policy was "not to insert advertising in such a manner as to affect the program content," that occasional errors do occur, but that it was taking steps to insure the errors were not repeated. The Judge was cognizant that there is no generally accepted definition of the term "affect program content." He concluded, however, that the letter was a misrepresentation because Western's assertion that its policy of "not inserting advertising . . . in such a manner as to affect program content" did not reflect Western's operating practice of expanding network station breaks by inserting local commercials.

14. Western contends that there was no misrepresentation because it understood the Commission inquiry to be concerned about whether the clipping affected "viewer enjoyment" of programs and that in fact its policy was to clip in a manner which did not affect viewer enjoyment. It asserts that even where substantive programming was deleted, it attempted to have "clean cut-ins" which would not be intrusive to its viewers. In view of this policy and its understanding of the inquiry, Western contends that merely leaving the network early or rejoining it late a number of times does not establish that its letter was a misrepresentation.

15. In our view, the April 21 response also demonstrates a lack of that degree of candor which we expect from our licensees. Although we asked to be advised of all the circumstances surrounding the interference, there is no mention of the clipping which was the basic cause of the inter-

ference. Western also asserted that when "errors" do occur "steps are taken in order to insure that they will not be repeated." Here the only step taken was to speak with the operator who was on duty, an ineffective precaution because even if there were no operator errors there would still be significant intrusions into the network feed because of the number and length of the local commercials scheduled by KORK-TV. Moreover, while the term "affect program content" is ambiguous and Western's stated policy may have been to avoid clipping which would affect program content within its understanding of the term, it is readily apparent that Western's stated policy was not in accord with its actual practice, because viewer enjoyment, as defined by Western, was disrupted, as evidenced by the viewer complaints.

16. On May 14, 1971, the Commission wrote a letter to Western, noting the previous correspondence and a new (third) complaint from a viewer, and requested a detailed statement of the "procedure . . . adopted, or [you] intend to adopt, to prevent recurrence of the practices complained of." Western's reply, dated June 1, 1971, was also lacking in candor and contained misrepresentations. Western advised the Commission that it was carrying a relatively heavy commercial load, leading to tight scheduling requirements necessitating alertness and exact switching by the operator on duty. The tenor of this statement was to convey to the Commission that KORK-TV had a tight but workable schedule and that interference could be avoided barring operator errors. The problem, however, did not lie with its operators but with its schedule. While operator error may have compounded KORK-TV's problems, the root cause of these problems was the clipping, and even if its operator strictly adhered to KORK-TV's schedule, there would still have been significant unwarranted intrusions into the network feed.

17. Western also represented that its problems were compounded by the fact that advertising agencies were

"not always careful about meeting precise commercial announcement length requirements." This statement is patently misleading. The problem rested with Western's scheduling practices, and even if the commercial announcements were several seconds too long the resultant clipping would have been *de minimis* when compared with Western's regular practice of expanding network breaks.

18. The June 1 letter also advised the Commission that Western reduced its commercial load level and stated that it believed it had "taken every possible and reasonable step to insure that commercial matter will not interfere with program content." These representations were incomplete and in part untrue. It is obvious that Western had not "taken every possible and reasonable step" because it continued to overload network breaks during its daytime programming, and interference continued until Western eliminated the commercial overloading during daytime program breaks.

19. The Commission received still another complaint concerning the interference with network programming on KORK-TV. On July 15, 1971, the Commission, citing the earlier correspondence again solicited Western's comments. Given another opportunity to explain its operating policies, Western, in a reply dated August 2, 1971, continued to attribute the interference to operator error and allowed its prior false, misleading and evasive representations to remain uncorrected.

20. Western's responses were clearly designed to conceal its operating practices from the Commission. It placed an overly narrow interpretation on the Commission's inquiries and we reject Western's contention that Mr. Tabor and Mr. Ordenez believed their responses were true and complete. While we agree that the term "affect program content" is not defined, we note that Western was asked to explain all the circumstances surrounding the various complaints and that there was interference with program

content within their definition of the term. There is nothing in the responses to indicate that local commercials were being transmitted outside of authorized times, and the interference is erroneously attributed to operator error and overlength commercials while Western ignored the clipping required by its broadcast schedule. There is also no merit to Western's arguments concerning the lack of motive for Mr. Tabor and Mr. Ordonez to lie, because the letters served to conceal KORK-TV's improper practices, protect their jobs and reputations and KORK-TV's license, and insure the receipt of extra revenue from the overcommercialization.

#### Licensee Responsibility

21. Western is the wholly owned subsidiary of Donrey, Inc. The sole shareholder of Donrey, Inc. is Mr. Donald W. Reynolds, Sr., who was also the ultimate owner of station KFSA-TV, Fort Smith, Arkansas, and KOLQ-TV, Reno, Nevada. His son, Mr. Donald W. Reynolds, Jr. was the supervisor over all his broadcast properties. As the sole principal of Donrey, Mr. Reynolds, Sr. delegated a great deal of authority to his station managers and his son. Western asserts that the delegation of authority was proper for a multiple owner, that Mr. Reynolds, Sr. could not have reasonably anticipated the wrongdoing chronicled in this proceeding, that he took due care to prevent rule violations and that neither he nor his son were aware of any violations. In this connection Western states that Mr. Reynolds, Sr. required regular written reports of his broadcast operations from his son and the station managers and that all problems concerning station operations be brought to the attention of his communications counsel. It also asserts that Mr. Tabor and Mr. Ordonez were long-time, trusted employees and, citing *Bluegrass Broadcasting Co., supra*, concludes that Mr. Reynolds, Sr. could reasonably rely on them, and, in view of that reliance, denial of renewal would not be an appropriate sanction.

22. Western's contentions lack merit and they must be rejected. In this case, the Judge found, and his findings which are supported by substantial evidence of record are affirmed, that Mr. Reynolds, Sr. not only delegated all of his authority for day-to-day station operations to his son, Mr. Reynolds, Jr., but that he failed to exercise the necessary diligence to insure that his agents and employees were complying with Rule 73.1205. With respect to Mr. Reynolds, Jr., the Judge found, and again we affirm his findings as supported by substantial evidence, that he had responsibility for and tacit knowledge of the station's practice of clipping; and that if, with the knowledge he had concerning the extent of local commercial broadcasts during network breaks, "he then remained unaware of the specifics of the clipping it was only because he chose to remain unaware." (Initial Decision para. 168.) As for the station managers who were directly involved in the wrongdoing established by the record herein and who are also officers and directors of Western, they were delegated authority to respond to Commission inquiries concerning alleged improper activities at the station, but the Reynolds failed to take adequate precautions to insure the responses were accurate and complete. On the contrary it appears that no adequate investigation was conducted by the licensee to determine the true situation at the stations.

23. No comparable factual situation was presented in *Bluegrass* and the case clearly is inapposite. In the circumstance of this case, Western's contentions amount to a claim for special consideration solely because of its absentee ownership and it is entitled to no such special consideration or special benefits on that ground. As we have repeatedly held, a multiple station owner or an absentee owner is subject to the same degree of responsibility for adequate supervision and control over station operations as a local station owner and the licensee cannot absolve itself from liability for wrongdoing merely by isolating itself from day-to-day station operations since no justifica-

tion exists for setting a different standard of conduct for a multiple of absentee owner than for a local owner. *United Broadcasting Co. of Florida, Inc.*, 55 FCC 2d 832 at 839 (1975); *Continental Broadcasting, Inc.*, 15 FCC 2d 120 at 131 (1968). Particularly in this case where, as found by the Judge, Mr. Reynolds, Sr., owner of the licensee corporation, "exercised no diligence whatsoever to see that his agents and employees were complying with the rule" (Initial Decision para. 169), Western merits no special consideration by reason of its absentee ownership.

#### *Valley's Qualifications*

24. The issues designated against Valley included, *inter alia*, issues:

To determine whether Las Vegas Valley Broadcasting Company can reasonably expect to secure a network affiliation and, if not, the effect on Valley's financial qualifications and its ability to effectuate its program proposal.

To determine the terms and conditions of the proposed bank loan from Nevada State Bank relied upon by Valley, whether Valley can meet the terms and conditions, and whether, in light thereof, the proposed loan will in fact be available to it.

To determine the cost, terms and conditions which must be met by Valley to obtain access to its proposed transmitter site and their effect on its financial qualifications.

To determine in view of the facts adduced pursuant to the foregoing issues, whether Valley is financially qualified to construct and operate its proposed station.

25. Valley's financial qualifications were dependent on a \$1,000,000 loan commitment from the Nevada State Bank.

The conditions for the loan, set forth in letters dated August 23, 1971 and February 22, 1973, provided, *inter alia*, that all of Valley's assets would be collateral for the loan and that the loan would be used for the purchase of land and equipment, and certain construction and operating costs. The Nevada State Bank letter also stated that a consideration in its decision to make the loan was its "understanding of the value of an operating NBC network affiliated VHF television station in the Las Vegas market." The Judge resolved the financial qualifications issue against Valley, concluding that it had not established that it could reasonably expect to secure a network affiliation; that it could meet the bank's requirements for making the loan; and the terms for achieving access to its transmitter site and its ability to meet those terms.

#### *Valley's Network Affiliation*

26. NBC will not commit itself to the grant of an affiliation agreement more than six months before a station is ready to go on the air. The Judge found that NBC would regard any one of the four Las Vegas stations (including Valley) as a possible substitute for KORK-TV, that Valley as a new station would be at a disadvantage because NBC considers new stations to be more trouble-prone and it prefers to affiliate with existing stations, but that Valley would have a distinct advantage over the other Las Vegas stations because it proposes a coverage area superior to the existing stations, and will offer NBC continued channel identification. The Judge found that "Valley has a reasonable hope of securing the network affiliation" (Initial Decision para. 183)<sup>12</sup> but that it "would be somewhat speculative even to describe its prospects as a strong probability." Asserting that in the absence of a network affiliation the

<sup>12</sup> But see Initial Decision para. 198, where the Judge stated that Valley's prospect of obtaining a network affiliation "is less than a reasonable probability."

bank loan will not be available, the Judge concluded that Valley had not established its financial qualifications.

27. We agree with Valley and the Broadcast Bureau that the Judge imposed too heavy a burden on Valley to show the availability of its network affiliation. Valley was only required to show that "it could reasonably expect to secure a network affiliation," and indeed the Judge initially found Valley had a "reasonable hope" of securing an affiliation. Since NBC will not commit itself to affiliate with a new licensee more than six months before it is ready to go on the air, resolution of the designated issue must be dependent on a weighing of all favorable factors which NBC would consider. NBC's primary concern in granting an affiliation agreement is unduplicated coverage.<sup>13</sup> Since Valley would have a coverage area with unduplicated audience superior to that of any existing Las Vegas station,<sup>14</sup> Valley would also have a distinct advantage as KORK-TV's successor enabling NBC to maintain its channel identification.<sup>15</sup> Although NBC would prefer a more experienced licensee, this was only one of many factors (equipment, programming, staffing and finances)<sup>16</sup> and there is no evidence that NBC would prefer any of the other Las Vegas stations under these criteria. Considering all the criteria, Valley established that it would have an advantage as a potential

<sup>13</sup> An NBC witness testified that superior coverage was the primary factor in decisions to change affiliations in Portland, Oregon and Seattle, Washington.

<sup>14</sup> It appears that one factor in the previous denial of an NBC affiliation agreement with WVVU, the existing independent Las Vegas station, was its inferior coverage area.

<sup>15</sup> The NBC witness testified that he could not recall one instance where an affiliation agreement was denied to a successor licensee after a voluntary transfer.

<sup>16</sup> If we are able to find Valley financially qualified there is no reason to believe NBC would not be satisfied with its financial proposal.

NBC affiliate over the other Las Vegas stations, and this is sufficient to establish a reasonable expectation that an affiliation agreement will be available.

28. The Judge's finding that Valley had not established the availability of a network affiliation was only one of the bases upon which he predicated Valley's disqualification. Consequently, resolution of the network affiliation issue favorably to Valley establishes that Valley will reasonably be able to satisfy one of the conditions of the Nevada State Bank letter, but it does not establish that the applicant is financially qualified. For the reasons hereinafter set forth, we affirm the Judge's finding that Valley has not established that the bank loan will be available or that it will be able to finance access to its antenna site, and the Judge's ultimate conclusion that Valley has not sustained its burden of showing that it is financially qualified.

#### Valley's Bank Commitment

29. The Judge found that Valley intends to lease its land and buildings and will not have any real property to pledge as collateral for the loan. Moreover, Valley is planning to purchase its equipment from RCA pursuant to credit terms which grant RCA an exclusive lien on the equipment. In order to ascertain the impact of Valley's inability to pledge either real estate or its equipment as collateral for the loan, as contemplated in the commitment letters, interrogatories were served on Mr. Harley Harmon, the President of the Nevada State Bank. Mr. Harmon stated that whether the bank would make the loan would depend on the conditions existing at the time of the loan and that the amount of collateral the bank would require will "depend upon the conditions existing at the time the loan is required." The Judge concluded that the Nevada Bank may require additional collateral, the amount of that collateral and Valley's ability to furnish it remain unknown, and for this reason Valley failed to establish that it could meet the terms and conditions precedent to the loan.

30. Valley argues that we have never required an applicant to show more than a reasonable assurance a bank loan will be available, and that the reservations expressed by Mr. Harmon are "no more than routine reservations which the Commission has never found to render a commitment unreliable." It asserts that the Nevada State Bank was committed to the loan and there is no Commission requirement that a lender state the amount of collateral which will be available.

31. Valley's commitment letter conditions the bank loan on Valley providing liens on real property and equipment which would be purchased with the loan. Valley will not be able to give the Nevada State Bank the anticipated liens on its real property and equipment and the bank has not indicated what substitute collateral will be required. The answers to the interrogatories were not routine reservations as argued by Valley, but constitute rather a statement that the bank may revise its collateral requirements at the time the loan is requested if it believes the security offered is inadequate. There is nothing in this record to indicate the value of the collateral which will be required or that Valley can meet those requirements.

32. Although the Commission has never required an applicant to have a contractually binding loan commitment, Valley has cited no authority in support of its position that it need not show its ability to satisfy the bank's collateral requirements. In fact, we have consistently held that where a bank commitment is dependent on a contingency, the applicant must show its ability to satisfy that contingency. *Eastern Long Island Broadcasting, Inc.*, 1 FCC 2d 1525, 6 RR 2d 477 (Rev. Bd. 1965). In *Orange Nine, Inc.*, 7 FCC 2d 788, 9 RR 2d 1157 (1967), the Commission required an applicant with a commitment letter which stated "suitable collateral terms and conditions [were] to be arranged at the time of the closing," to establish the terms, conditions, and collateral the bank would require and the applicant's

ability to meet them. This Valley has not done here. Nor has Valley's showing complied with *Post-Newsweek Stations of Florida, Inc.*, 46 FCC 2d 647 (1974), where we held that a loan "subject to approval of our loan committee [based on] . . . current financial statements" of the corporation and certain stockholders at the time of the submission of the loan application did not offer adequate assurance that the loan will be available.

33. Valley was facing the bank commitment issue when Mr. Harmon responded to the interrogatories. Faced with a serious reservation which jeopardized the availability of the bank commitment, Valley had a duty to clarify Mr. Harmon's reservations so that we could determine the bank's requirements and Valley's ability to meet them. Valley failed to do so and there is adequate record support for the Judge's conclusion that Valley failed to establish that "its bank loan will not require collateral, or, if collateral is required, what it will be and that Valley can provide it."

#### Valley's Site Access

34. The site access issue was added solely to determine if Valley was financially able to meet the terms and conditions imposed on it for the use of the access road to its transmitter site. Although Valley intends to construct its transmitter on federally-owned land managed by the Interior Department's Bureau of Land Management (BLM), access to the site is dependent on a road owned by the Alta Development Corp. (Alta), 50% of which is owned by Western. If Valley is granted a construction permit, BLM will grant it a right of way. BLM, however, will not mediate any dispute between Valley and Alta (Western) concerning what Valley will have to pay for access and Alta is requiring Valley to purchase Western's share of the access road. Initially Western indicated it would want \$100,000 for its share of the access road. After Valley

budgeted an additional \$100,000 to purchase Western's share, Western revised its requirements asserting that it failed to allow for inflation and a return on its investment and that by September 30, 1976, its share of Alta would be worth \$189,937.50. Valley objected to paying this higher figure and the Judge concluded that Valley had not established that it can secure access to its transmitter site at a price it can afford to pay.

35. Valley argues that the dispute will be settled by litigation before Valley is ready to build its station. There is, however, no indication when the matter will be litigated or even that the dispute will be resolved in Valley's favor. Nor has Valley submitted evidence to support the validity of what it is offering for the road. We are aware that Valley is being forced to deal with a recalcitrant opponent, but it is Valley who chose the antenna site, and it is therefore incumbent upon Valley to show that it can finance access to that site. The record adequately supports the Judge's determination that Valley has not shown it can finance access to its site.

#### Valley's Petition to Amend Its Financial Showing

36. Valley's commitment from the Nevada State Bank expired on January 1, 1975, subsequent to the Initial Decision. On May 15, 1975, Valley filed a petition to amend its financial showing specifying a commitment in the sum of \$1,500,000 from City National Bank of Los Angeles, California.<sup>17</sup> Valley contends that Commission precedent re-

<sup>17</sup> Also pending is a motion filed March 13, 1975, by Western requesting the designation of misrepresentation and Section 1.65 issues against Valley. Western alleges that Valley failed to notify the Commission of the expiration of its bank loan and that it made material misrepresentations in its petition to amend its financial qualifications in an attempt to explain its failure to secure a timely extension of the loan. In light of Valley's disqualification the motion to add issues will be dismissed as moot.

quires us to address the merits of its new commitment without regard to its earlier showing. Valley, however, has misread our earlier cases, it has not cited, nor are we aware of, any comparative proceeding where we allowed a post-decisional amendment to correct a defective showing by a disqualified applicant; and its petition will be denied. The amendment is no more than a grossly untimely and blatant effort by Valley to shore up its defective financial showing after the close of the record and an adverse decision. We have consistently held that an applicant will not be given a further opportunity to make an improved showing that its application should be granted when that showing could have been made during the course of the hearing. Cf., *Guinan v. FCC*, 297 F.2d 787 (1961); *Voice of Dixie, Inc.*, 47 FCC 2d 526 (1974); *Nick J. Chaconas*, 35 FCC 2d 698 (1972); *The Tidewater Broadcasting Co., Inc.*, 14 FCC 2d 646 (1968); *The News-Sun Broadcasting Co.*, 24 FCC 2d 770 (Rev. Bd. 1970), review denied, FCC 71-33, released January 15, 1971. Moreover, we recently held in *Folkways Broadcasting Company, Inc.*, 57 FCC 2d 609 (1976), that acceptance of such post-decisional amendment could severely prejudice the *Ashbacker*<sup>18</sup> rights of a competing applicant.<sup>19</sup> Finally, we note that *Wilkesboro Broadcasting Co.*, 4 FCC 2d 164 (1966), which was cited by Valley, involved a pre-decisional amendment and that in *5 KW, Inc.*, 33 FCC 2d 895 (1972), the Review Board permitted an amendment in response to new matters raised in a petition to enlarge issues filed after the close of the hearing. Al-

<sup>18</sup> *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

<sup>19</sup> Valley argues that if Western's disqualification is affirmed, Western would no longer be an interested party with respect to Valley's basic qualifications. We do not agree. In *Folkways*, the competing applicant was disqualified, but had appealed the Commission decision. We found that the applicant still had potential *Ashbacker* rights which could be asserted if his appeal was granted. Here, because Western continues to prosecute its application, we are obligated to protect its potential *Ashbacker* rights.

though the Commission permitted post-decisional amendments in *Brown Broadcasting Co., Inc.*, 12 FCC 2d 189 (1968), and *United Broadcasting Co., Inc.*, 55 FCC 2d 416 (1975) those proceedings are distinguishable because the applicants involved had been found qualified, and the amendments were in response to questions which arose after issuance of the Initial Decisions. Valley's request for leave to amend and for acceptance of a new commitment letter must, therefore, be denied.

#### *Other Matters*

37. Western requested permission to file a supplemental brief to call "attention to the fact that the initial decision in another case, *WEAU, Inc.*, (FCC 74D-59), became final." The request will be denied. A supplementary pleading is not authorized under the rules. Moreover, Western failed to show good cause for its filing because *WEAU* was fully discussed in Western's prior pleadings, and because the Decision, which became final without the filing of exceptions or review, is not a binding Commission precedent. *Finalization of Initial Decisions*, FCC 61-25, 20 RR 114 (1961).

38. On February 13, 1976, Western filed a second supplementary brief to "reflect subsequent legal authorities." This pleading is the fourth brief and second unauthorized pleading filed by Western. We note, however, that over a year has elapsed since the filing of Western's initial brief, that a large number of Commission decisions addressing issues similar to those in this proceeding have been issued during that period, and that those cases were too numerous for Western to discuss during oral argument. In light of the seriousness which we attach to the sanctions being applied here, we are granting Western's second request for leave to file a supplementary pleading and we have

given due consideration to the precedents cited in the supplementary pleading.<sup>20</sup>

39. On February 13, 1976, Western requested us to take official notice of various pleadings and documents filed in the *KRMD, Inc.*, 53 FCC 2d 1179 (1975) and *West Michigan Telecasters, Inc.*, 57 FCC 2d 388 (1975) proceedings. Official notice is governed by the Federal Rules of Evidence, Rule 201, 28 U.S.C.A. which limits notice to adjudicative facts. An adjudicative fact is defined as one not

"... subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Rule 201(b), 28 U.S.C.A.

Western is seeking official notice of legal arguments and assertions in other proceedings involving different parties and different factual situations. Manifestly, these types of matters are not within the contemplation of Rule 201(b). Western's request for official notice will, therefore, be denied.

40. Western filed a "Motion to Reopen the Record, Enlarge the Issues, and for Other Relief" on June 25, 1976. Therein, Western argues that confidential information concerning instructions given to restricted personnel was disclosed to trade press representatives, that prohibited *ex parte* communications have occurred, and that Western has been prejudiced by the foregoing conduct. It therefore requests that the record be reopened, that issues be added

<sup>20</sup> We do not deem it necessary to discuss each of the numerous cases cited by Western. We have, however, fully considered the cases cited, and to the extent necessary they have been discussed in this Decision. In any event, we are satisfied that the instant Decision is consistent with prior Commission precedents and Western's pleading has not presented a basis for changing the outcome of this proceeding.

to determine all the pertinent facts and circumstances concerning the disclosures and *ex parte* communications, and whether, in light of the evidence adduced, any member of the Commission or other Commission personnel should be or should have been disqualified from participating in the proceeding. We have given careful consideration to the allegations contained in Western's motion but find no sufficient basis for reopening the record or granting any of the relief requested. While the events recited are most unfortunate Western was not prejudiced thereby. See also our *Memorandum Opinion and Orders*, FCC 76-318 adopted and released April 2, 1976, FCC 76-324, released April 19, 1976, and FCC 76-607, adopted June 29, 1976.<sup>21</sup>

41. We realize that our denial of both Western's renewal application and Valley's competing application will leave this frequency unoccupied at such time as Western's service is terminated. Every effort must therefore be made in the public interest to provide for a continuation of service by a qualified applicant at the earliest time practicable. While providing for such service is not a matter for consideration in this adjudicatory proceeding, we propose, in a separate proceeding to invite applications for a license for this facility and, if deemed advisable, for interim operation pending an award of a license, as soon as this law-

<sup>21</sup> We note that this is the sixth pleading filed by Western directed to the alleged *ex parte* violations. Each of the five prior pleadings was fully considered and denied in the cited *Memorandum Opinion and Orders* released April 2, 1976, and April 19, 1976, and adopted June 29, 1976. We also note that Western filed two unauthorized briefs (only one of which is accepted) and numerous other pleadings as set forth in Appendix B. Western pleadings have delayed the ultimate resolution of this proceeding and raise a question concerning counsel's compliance with Section 1.52 of our Rules, which provides in pertinent part, that their signatures on each Western pleading certifies their "belief there is good ground to support it; and that it is not interposed for delay." We plan to give no further consideration to this matter; counsel are advised that further pleadings directed to the alleged *ex parte* violations will be summarily dismissed.

fully can be done. In this connection, we shall entertain in that separate proceeding a request by Valley for a waiver of the 12-month waiting period contained in Section 1.519(a) of the Commission's Rules. Valley prosecuted its application through a lengthy hearing and it established its qualifications to be a Commission licensee in all respects except its financial qualifications. Provided that this ground of disqualification is removed and no other deficiencies are shown to exist, we believe that the public interest could be served by permitting Valley to file a new application for this facility without awaiting the expiration of 12 months.

42. ACCORDINGLY, IT IS ORDERED, That the application for renewal of the license for television station KORK-TV (BRCT-327), Las Vegas, Nevada, filed by Western Communications, Inc., and the mutually exclusive application for a new television station at Las Vegas, Nevada (BPCT-4465) filed by Las Vegas Valley Broadcasting Co., ARE DENIED; and

43. IT IS FURTHER ORDERED, That Western Communications, Inc., IS AUTHORIZED to continue to operate station KORK-TV until 12:01 a.m., October 1, 1976, to enable the licensee to conclude the station's affairs, PROVIDED, HOWEVER, that if the licensee seeks judicial review of our Decision, it is authorized to continue to operate Station KORK-TV until thirty (30) days after the court which has jurisdiction to review this proceeding issues its mandate.

44. IT IS FURTHER ORDERED, That the petition for leave to amend filed May 15, 1975, by Las Vegas Valley Broadcasting Co., IS DENIED; and

45. IT IS FURTHER ORDERED, That the request for summary denial of the application of Las Vegas Valley Broadcasting Co., or for alternative relief filed February 7, 1975, by Western Communications, Inc.; the motion to dismiss the application of Las Vegas Valley Broadcasting Co., filed April 30, 1975, by Western Communications, Inc.;

and the request to dismiss the petition for leave to amend filed by Las Vegas Valley Broadcasting Co., and for summary denial or dismissal of the application of Las Vegas Valley Broadcasting Co., filed March 2, 1976, by Western Communications, Inc., ARE DISMISSED as moot; and

46. IT IS FURTHER ORDERED, That the motion for leave to file a supplement to amendment and further statement in support of amendment, filed July 15, 1975, by Las Vegas Valley Broadcasting Co.; the motion for leave to file a second further statement in support of petition for leave to amend, filed March 29, 1976, by Las Vegas Valley Broadcasting Co.; and the petition for leave to file a second supplement to amendment filed March 29, 1976, by Las Vegas Valley Broadcasting Co., ARE DISMISSED as moot; and

47. IT IS FURTHER ORDERED, That the motion to add a misrepresentation and lack of candor issue and reopen the record for further proceedings, filed March 13, 1975, by Western Communications, Inc., IS DISMISSED as moot; and

48. IT IS FURTHER ORDERED, That the motion to reopen the record and request for other relief, filed February 27, 1975, by Western Communications, Inc., IS DENIED; and

49. IT IS FURTHER ORDERED, That the motion for leave to file reply brief in excess of page limitation, filed December 2, 1974, by Las Vegas Valley Broadcasting Co., IS GRANTED; and

50. IT IS FURTHER ORDERED, That the motion for leave to file supplement to brief and reply brief, filed February 27, 1975, by Western Communication, IS DENIED; and

51. IT IS FURTHER ORDERED, That the motion to file supplement to brief and reply brief, filed February 13, 1976, by Western Communications, Inc., IS GRANTED; and

52. IT IS FURTHER ORDERED, That the request for official notice filed February 13, 1976, by Western Communications, Inc. IS DENIED; and

53. IT IS FURTHER ORDERED, That unopposed motions to correct transcript filed March 26, 1976, by Western Communications, Inc. and by Las Vegas Valley Broadcasting Co., ARE GRANTED; and

54. IT IS FURTHER ORDERED, That the motion to reopen the record, enlarge the issues, and for other relief, filed June 25, 1976, by Western Communications, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,  
VINCENT J. MULLINS, *Secretary*.

#### APPENDIX A

##### Rulings on Western's Exceptions

##### Rulings on Exceptions Related to Western's Qualifications

##### *Exception Nos.*

##### *Rulings*

1

*DENIED.* The provisions of the affiliation agreement are relevant to the fraudulent billing issue.

2, 5, 6, 7, 9, 10, 11, 13, 15,  
16, 17, 19, 20, 26, 27, 31, 43  
47, 48, 53, 54, 58, 59, 62, 69,  
72, 79A, 79B, 89, 90, 96, 99,  
100, 102, 103, 104, 107, 114,  
115, 116, 117, 118, 119, 120,  
121, 122, 123, 124, 126,  
134A, 136, 137, 140, 141,  
150, 153, 165

*DENIED.* The exceptions are not of decisional significance.

3, 12, 14, 18, 21, 22, 23, 24,  
28, 30, 32, 33, 34, 35, 36, 38,  
39, 40, 41, 44, 46, 49, 60, 64,  
67, 71, 73, 75, 76, 77, 80, 81,  
88, 91, 92, 95, 97, 105, 106,  
108, 112, 113, 125, 133, 135,  
138, 142, 144, 146, 152, 160,  
163, 164, 166, 170, 171, 173,  
175, 176

*DENIED.* The Judge's findings and conclusions are supported by the evidence of record and relevant to the designated issues.

4

*DENIED.* Western's fraudulent billing was predicated on its false station reports.

*Exception Nos.**Rulings*

8, 25, 37, 50, 51, 52, 56, 57,  
79C, 79D, 79E, 84, 101, 129,  
148, 149, 151, 162A, 162B,  
162C

**DENIED.** The Judges findings and conclusions are compatible with and reflect adequately the evidence of record.

29, 42, 55, 63, 65, 66, 68, 70,  
74, 82, 85, 93, 94, 128, 130,  
131, 132, 145, 161, 162, 168,  
180

**DENIED.** The requested findings and conclusions are not supported by the evidence of record.

45

**GRANTED** in part. The Judge's finding is relevant to the extent that it is supported by station reports which were placed in evidence. In all other respects the exception is **DENIED**.

61

**DENIED.** The exception fails to set forth with specificity what additional findings the Judge should have made.

78, 79

**DENIED.** The requested conclusions are contrary to Commission precedent. *Blackstone Broadcasting Corp.*, 52 FCC 2d 1106 (1975).

83, 87

**GRANTED** in part. Western broadcast 90 seconds of commercials during only 5 of 10-1970 World Series network breaks, and on one occasion it broadcast 120 seconds of local commercials. In all other respects the exceptions are **DENIED** because the Judge's finding are supported by the evidence of record.

86

**DENIED.** Even if Mr. Tabor believed KORK-TV had 42-second network breaks and 20-second commercials, he was still scheduling more commercials then he believed the network breaks could accommodate.

98

**DENIED.** The exception does not state with specificity why the Judge's finding is in error.

109, 110, 111, 127, 139, 143,  
147

**DENIED.** The Commission's inquiries were broad enough to require full disclosure of all circumstances surrounding the program interference including the policy of clipping network transmissions.

*Exception Nos.**Rulings*

134

**DENIED.** The requested finding does not accurately and adequately describe the contents of the Commission's inquiry.

154, 155, 156, 157, 158, 159,  
172, 174, 177, 178, 179

**DENIED.** The exceptions were fully considered and rejected in our discussion of licensee responsibility in our Decision.

167

**DENIED.** The Initial Decision is supported by *Wharton Communications Inc.*, 44 FCC 2d 489 (1973).

169

**DENIED.** The Initial Decision is consistent with prior decisions. *Nick J. Chaconas*, 28 FCC 2d 231 (1971), *recon. denied*, 35 FCC 2d 698 (1972), and other cases cited in our Decision.

#### Rulings on Exceptions Related to the Comparative Issues and Other Questions

*Exception Nos.**Rulings*

181-204A inclusive, 288-379  
inclusive, 380, 382, 383, 384,  
385, 386, 387, 388, 389, 390,  
391, 392, 394, 395, 396, 397,  
398, 399, 400, 401, 402, 403,  
404, 405, 406, 407, 408, 409,  
411, 413, 422, 427, 429, 430,  
431

**DENIED.** The exceptions are not of decisional significance.

381, 393

**DENIED.** The Review Board's orders are consistent with and supported by case precedent.

410

**DENIED.** The question was relevant to the awareness of Mr. Donald Reynolds, Jr. of the problems at KORK-TV.

412

**DENIED.** There was an adequate basis for treating Mr. Donald Reynolds, Jr. as adverse witness.

414, 433

**DENIED.** The questions were not relevant to the designated issues.

415, 416

**DENIED.** The witnesses were competent to answer the questions asked.

417, 423

**DENIED.** The record supports the timeliness of Valley's requests and exhibits.

*Exception Nos.**Rulings*

418, 419, 420, 421

**GRANTED** in part. The exhibits are relevant to the fraudulent billing issue to the extent that they were compared on the record with the affidavits sent to NBC. **DENIED** in all other respects because the exhibits confirm the other evidence of the clipping of commercials.

424, 425, 426

**DENIED**. The exhibits are competent and relevant to the designated issues.

428, 432

**DENIED**. The proferred exhibits were not competent evidence.

## Rulings on Western's Exceptions Relating to Valley's Qualifications

*Exception Nos.**Rulings*

205, 206, 222, 223, 230, 231, 262, 271, 284, 286, 287

**DENIED**. The Judge's findings and conclusions are supported adequately by the evidence of record.

207

**DENIED**. The exception is an incomplete and misleading characterization of the record. Mr. Mercer testified that he lacked sufficient information to determine whether Valley had a "reasonable expectation" of becoming an NBC affiliate. He testified, however, That valley would get "fair consideration," and we conclude, based on the testimony concerning the criteria which NBC considers in awarding affiliation agreements, that Valley can "reasonably expect" to secure a network affiliation.

208, 210, 215, 216, 217, 218, 221, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242-257 inclusive, 258, 259, 260, 261, 265, 272, 274, 275, 276, 281, 282, 283

**DENIED**. The exceptions are not of decisional significance.

209, 263, 264, 267, 268, 269, 270, 277, 278

**DENIED**. The Judge's findings and conclusions are compatible with and reflect adequately, the evidence of record.

211, 212, 214, 219, 220, 224, 225, 226, 227, 228, 266, 273, 279, 280, 285

**DENIED**. The requested findings and conclusions are not supported by the evidence of record.

*Exception Nos.**Rulings*

213

**DENIED**. Mr. Mercer testified that the difference in coverage area was a factor to be considered in awarding a network affiliation.

229

**DENIED**. Valley established that it can reasonably expect to secure a network affiliation.

## Rulings on Valley's Exceptions

## Rulings on Exceptions Related to Western's Qualifications

*Exception Nos.**Rulings*1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, <sup>1</sup> 14, 43, 44, 45

**DENIED**. The exceptions are not of decisional significance.

7

**DENIED**. The Judge's findings are supported by the evidence of record.

## Rulings on Valley's Exceptions Related to the Comparative Issues

15, 27-42 inclusive, 46, 47, 55

**DENIED**. The exceptions are not of decisional significance.

## Ruling's on Valley's Exceptions Related to Valley's Qualifications

*Exception Nos.**Rulings*

16, 16A, 16B, 18, 19, 20, 21a, 21b, 22, 23, 24a, 24b

**DENIED**. The exceptions are not of decisional significance.

17a

**GRANTED** to the extent that Mr. Mercer testified that circulation was a factor in the decision to deny WVVU an affiliation agreement.

17b

**DENIED**. The requested finding is a mischaracterization of the record. Mr. Mercer testified only that NBC has not changed its network affiliation in the Las Vegas market.

17c

**GRANTED**.

17d

**DENIED**. Mr. Mercer testified that Valley would be given "fair consideration" along with any other VHF stations that applied for a network affiliation.

<sup>1</sup> Valley filed two exceptions numbered 14.

*Exception Nos.**Rulings*

- 17e *GRANTED* to the extent that continuation of channel identification is a factor NBC considers in awarding affiliation agreements and in all other respects the exception is *DENIED* as not supported by the record.
- 21e *DENIED*. The commitment letter from the Nevada State Bank stated its understanding that the loan would be used to purchase equipment and that "all assets" of the station would be required as collateral.
- 21d *DENIED*. The record does not support a finding that Valley is financially qualified.
- 24e *DENIED*. The requested finding is repetitive. See paras. 74-75 of the Initial Decision.
- 25, 26, 52, 53, 56 *DENIED*. The Judge's findings and conclusions are supported by the evidence of record.
- 48, 50 *GRANTED*. Valley was only required to establish that it can "reasonably expect" to secure a network affiliation agreement, and, as found in our Decision, Valley would be preferred over the Las Vegas stations under the criteria which NBC considers in awarding network affiliations.
- 49 *DENIED*. The Judge's conclusions are supported by the evidence of record.
- 51 *GRANTED*. Valley has established a reasonable expectation that it will be able to secure a network affiliation.
- 54 *DENIED*. The requested conclusion is contrary to the evidence of record.

*Rulings on Exceptions of the Broadcast Bureau**Exception Nos.**Rulings*

- 1, 2 *GRANTED*.
- 3 *DENIED*. The contents of the April 8, 1971, letter are reflected adequately in the Initial Decision.
- 4 *DENIED*. The Judge's findings are supported by the evidence of record.
- 5, 6, 7, 8, 9, 10 *GRANTED*.

## APPENDIX B

## Ancillary motions and pleadings considered in this Decision

- (1) Request for summary denial of Valley's application or for alternative relief, filed February 7, 1976, by Western.
- (2) Opposition to Item (1), filed March 3, 1975, by Valley.
- (3) Comments on Item (1), filed February 21, 1975, by the Bureau.
- (4) Reply to Items (2) and (3), filed March 13, 1975, by Western.
- (5) Motion to add misrepresentation and lack of candor issues and reopen the record filed March 13, 1975, by Western.
- (6) Supplement to Item (5), filed March 17, 1975, by Western.
- (7) Comments on Items (5) and (6), filed March 26, 1975, by the Bureau.
- (8) Opposition to Items (5) and (6), filed March 31, 1975, by Valley.
- (9) Reply to Item (8), filed April 15, 1975, by Western.
- (10) Submission pursuant to Section 1.65 and motion to reopen the record, filed February 27, 1975, by Western.
- (11) Oppositions to Item (10), filed March 17, 1975, by Valley and by the Bureau.
- (12) Reply to Item (11), filed March 27, 1975, by Western.
- (13) Motion to dismiss Valley's application, filed April 30, 1975, by Western.
- (14) Comments on Item (13), filed May 14, 1975, by the Bureau.
- (15) Opposition to Item (13), filed May 15, 1975, by Valley.
- (16) Petition for Leave to Amend, filed May 15, 1975, by Valley.
- (17) Oppositions to Item (16), both filed June 3, 1975, by Western and the Bureau.
- (18) Motion for leave to file supplement to amendment and further statement in support of amendment, filed July 15, 1975, by Valley.
- (19) Oppositions to Item (18), both filed July 24, 1975, by Western and by the Bureau.
- (20) Request for official notice, filed February 13, 1976, by Western.
- (21) Opposition to Item (20), filed February 25, 1976, by the Bureau.

- (22) Motion for leave to file supplement to brief and reply brief, and supplement to brief and reply brief, both filed February 13, 1976, by Western.
- (23) Partial opposition to Item (22), filed February 25, 1976, by the Bureau.
- (24) Comments on Item (22), filed March 2, 1976, by Valley.
- (25) Request to dismiss Item (16), and for summary denial of Valley's application filed March 2, 1976, by Western.
- (26) Motion for leave to file second further statement, and second further statement in support of Item (16), both filed March 29, 1976, by Valley.
- (27) Petition for leave to file second supplement to amendment, filed March 29, 1976, by Valley.
- (28) Comments on Item (26), filed April 13, 1976, by the Bureau.
- (29) Opposition to multiple dilatory papers filed March 29, 1976, filed April 13, 1976, by Western Communications, Inc.
- (30) Motions to correct transcript filed March 26, 1976, by Valley and by Western.
- (31) Motion to reopen the record, enlarge issues, and for other relief, filed June 25, 1976, by Western.

STATEMENT OF COMMISSIONER JAMES H. QUELLO

In Re: KORK-TV

Certain press reports have alleged that I inadvertently contributed to a premature release of information in this proceeding. My comments to the press were of a general, philosophical nature and, in my opinion, could not have contributed materially to an understanding of the specific action taken by the Commission. Nor do I believe that such comments could in any way have prejudiced either party; however, with a view toward avoiding even an appearance of impropriety, I have decided to abstain from voting on the *Final Decision*.

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

In Re Application of

Docket No. 19519

File No. BRCT-327

WESTERN COMMUNICATIONS, INC.

(KORK-TV), LAS VEGAS, NEVADA

For Renewal of License

Docket No. 19581

File No. BPCT-4465

LAS VEGAS VALLEY BROADCASTING Co.,

LAS VEGAS, NEVADA

For Construction Permit for New Television  
Broadcast Station

Memorandum Opinion and Order

(Adopted: November 9, 1976; Released: November 19, 1976)

BY THE COMMISSION: COMMISSIONER QUELLO ABSTAINING  
FROM VOTING; COMMISSIONER WHITE NOT PARTICIPATING.

1. In a Decision, 59 FCC 2d 1441, released July 2, 1976, the Commission denied the application of Western Communications Inc. (Western) for renewal of its license for television Station KORK-TV, Las Vegas, Nevada; and a mutually exclusive application for a new television station at Las Vegas, filed by Las Vegas Valley Broadcasting Co.

(Las Vegas Valley). In its Decision, the Commission also dismissed a petition to enlarge issues filed by Western as moot, and it denied a request by Western for further hearings to determine the facts surrounding a premature disclosure (leak) of the Commission's Decision. The Commission further stated that it would entertain a request by Las Vegas Valley for waiver of the time limitation on filing repetitious applications specified in Section 1.519(a) of the Rules. The Commission also conducted an investigation into the leaks, and in Orders, FCC 76-318 adopted and released April 2, 1976, and FCC 76-607 released July 1, 1976, held there was no basis for finding prejudice, bias or prejudgment in any of the disclosures, and that its investigation was concerned solely with "internal disciplinary procedures." In its July 2 Decision, the Commission took cognizance of numerous and repetitive pleadings filed by Western with respect to the disclosures, and its counsel was advised that further pleadings directed to the disclosures would "be summarily dismissed."

2. Western then filed a Freedom of Information Act (FOIA) request for disclosure of all information and papers concerning the investigation into the KORK-TV-Las Vegas Valley leaks. Predicated in part on the FOIA materials, Western, on August 2, 1976, filed a petition for partial reconsideration/rehearing. Also before the Commission are oppositions filed August 17, 1976, by Las Vegas Valley and by the Chief, Broadcast Bureau, and a reply filed August 27, 1976, by Western; a petition for reconsideration filed August 2, 1976, by Las Vegas Valley, oppositions filed August 17, 1976, by Western and by the Chief, Broadcast Bureau, and comments filed August 25, 1976, by Nevada Independent Broadcasting Company (KVVU-TV);<sup>1</sup> a motion to strike the comments of KVVU-TV,

<sup>1</sup> Nevada Independent Broadcasting Company is licensee of VHF television station KVVU-TV, Henderson, Nevada, which also serves Las Vegas, Nevada.

filed August 31, 1976, by Western, and comments thereon filed September 3, 1976, by the Chief, Broadcast Bureau; and a motion to dismiss the pleading of KVVU-TV, filed September 1, 1976, by Las Vegas Valley, and comments filed September 7, 1976, by KVVU-TV.<sup>2</sup>

3. It is the general and sound rule of law that the only valid grounds for reconsideration and rehearing are manifest error or omissions so material that their correction will result in a substantial alteration of the original decision. Correspondingly, a rehearing will not be granted by the Commission merely for the purpose of arguing matters which have been considered previously and resolved. *WWIZ, Inc.*, 37 FCC 685 (1964), *affirmed sub nom.*, *Lorain Journal Company v. FCC*, 122 U.S. App. D.C. 127, 351 F2d 824 (1965), *cert. denied*, 383 U.S. 967 (1966); *United Television Company, Inc.*, 59 FCC 2d 663 (1976); and *Eastminister Broadcasting Corp.*, FCC 76-673, released July 30, 1976.

4. In the previous Orders and in the Decision in this proceeding, we fully considered Western's assertion that the premature disclosure of the KORK-TV-Las Vegas Valley Decision required further hearings and we found Western's arguments to be without merit. Although the FOIA materials were not previously available to Western, these materials fail to raise questions concerning the propriety of our earlier determinations. Although the leaks may have violated the Commission's internal procedures, the FOIA material does not establish a basis for finding that the leaks involved bias or prejudice, indicated a prejudgment of the merits of this proceeding, or that additional hearings would do anything more than delay the proceeding without any likelihood of altering the outcome. To the extent Western's petition is directed to the so-called leaks, its arguments were fully considered, they are en-

<sup>2</sup> KVVU-TV's August 25, 1976, comments will be dismissed as an unauthorized pleading by a non-party.

tirely without merit, and will be rejected. See also, our Decision, 59 FCC 2d at 1456 (footnote 21).

5. We also find no merit in Western's arguments that, by stating we would entertain an application from Las Vegas Valley for a waiver of Section 1.519(a) of the Commission's Rules, we have prejudged the merits of any waiver application and that we erred finding it had established its nonfinancial qualifications without considering the merits of Western's petition to enlarge issues. The Decision expressly provided that grant of a waiver would be contingent on there being no disqualifying factors present. Moreover since the Decision provided only that we would entertain a waiver application, the burden will still be on Las Vegas Valley to establish that the public interest would be served by the grant of a waiver. While the issues raised by the petition to enlarge issues may well have been disqualifying, there was no need to consider the petition in light of Las Vegas Valley's disqualification, and in the absence of a waiver application or new license application, consideration of those issues would be premature.

6. Las Vegas Valley's petition for reconsideration, in major respects, again urges that the Commission should adopt its version of the facts and law applicable to this proceeding. These contentions have been fully considered and rejected in our Decision. Las Vegas Valley presents no new theory for its case or any reason for placing a different interpretation on the evidence of record or which would required a different result. Nevertheless, we have reviewed the record in the light of Las Vegas Valley's pleadings, and, except as set forth below, find no reason to depart from the findings and conclusions contained in the Decision.

7. In our Decision we noted that one of the bases upon which Las Vegas Valley was disqualified was its failure to establish the terms for access to its proposed antenna site and its ability to satisfy those terms. Las Vegas Valley's

difficulty in this regard lies in the fact that access to its antenna site is dependent upon its ability to negotiate satisfactory terms from Western for the purchase of Western's share of an access road. If they cannot reach an agreement, the terms of purchase will be settled by litigation or arbitration. Valley asserts that our Decision misstated its position<sup>3</sup> in that the litigation or arbitration will not be concluded until after the grant of its permit, construction has been completed, and it has commenced operation of its facilities. Las Vegas Valley contends that, because it will be a Bureau of Land Management (BLM) permittee it will be assured access even in the absence of an agreement with Western, that the cost of access will not involve any out of pocket expenditures until such time as an agreement is reached, and that the cost of the access road would thus have no effect on its financial qualifications even if there is no agreement. Las Vegas Valley's argument, however, ignores its burden of establishing that it will be able to achieve access, and the record is devoid of any substantial evidence that it will be able to use the road in the absence of an agreement with Western. While

<sup>3</sup> Las Vegas Valley also argues that paragraph 30 of our Decision misstated its position with respect to the responses of the President of the Nevada State Bank to interrogatories relating to the availability of its bank loan. It asserts that the Judge, not Las Vegas Valley, characterized the responses to interrogatories 9 and 10 as "routine reservations which the Commission has never found to render a commitment unreliable." Aside from a typographical error—the word "unreliable" appears as "reliable"—paragraph 30 accurately reflects Las Vegas Valley's position. Las Vegas Valley cited the quotation from the Initial Decision about "routine reservations" with favor in its brief in support of exceptions filed October 29, 1974, at p. 25 and in its petition for reconsideration at pp. 5 and 6. Moreover, we fail to see how the statement that the reservations were "routine reservations which the Commission has never found to render a commitment unreliable" materially differs from the statement that they are "precisely the kind of reservation which the Commission is used to" as argued by Las Vegas (petition for reconsideration at p. 6).

Las Vegas Valley may be able to secure a BLM permit, it is undisputed that Western will require reimbursement before it will allow Las Vegas Valley to use the road. A BLM witness testified that any permit would be subject to whatever arrangements can be made by the parties, that BLM will not play a role in determining what those arrangements will be, and that he did not know if BLM would or had the authority to compel Western to grant Las Vegas access in the absence of an agreement. Clearly, then, there is no basis upon which we can find that Las Vegas Valley will be able to achieve access while deferring the cost thereof. Moreover, as we found in our Decision, Las Vegas Valley had not shown when it will be able to settle any litigation or arbitration, it has not established a basis for accepting any specific cost figure other than that proposed by Western, and it has not allocated sufficient funds to satisfy Western's demands.\* Finally we note that Las Vegas Valley failed to establish its ability to achieve its bank loan, so that even if it were able to establish the terms for access to its antenna site and its ability to satisfy those terms, it would still not be financially qualified to be a licensee.

8. Accordingly, It Is ORDERED, That the petition for partial reconsideration/rehearing, filed August 2, 1976, by Western Communications, Inc., and the petition for reconsideration filed August 2, 1976, by Las Vegas Valley Broadcasting Co., ARE DENIED; and

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\* Las Vegas Valley asserts that because it has allocated \$100,000 for purchase of Western's share of the access road, that it will, even if Western is awarded its full demand, be at most only \$89,000 short. Western's estimate, however, was contingent on Las Vegas Valley purchasing Western's share of the access road by September 30, 1976. The estimate includes maintenance costs and inflation and, as a result, has risen throughout this proceeding and there is reason to believe that after September, 1976, Western's demand will exceed \$189,000.

9. It Is FURTHER ORDERED, That the motions to strike filed August 31, 1976, by Western Communications, Inc., and to dismiss unauthorized pleading filed September 1, 1976, by Las Vegas Valley Broadcasting Co., ARE GRANTED, and the comments filed August 25, 1976, by Nevada Independent Broadcasting Corp., ARE STRICKEN.

FEDERAL COMMUNICATIONS COMMISSION,

VINCENT J. MULLINS, *Secretary*.

## APPENDIX C

F.C.C. 74D-37

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

Docket No. 19519  
 File No. BRCT-327  
 File No. BPCT-4465

In Re Applications of:

WESTERN COMMUNICATIONS, INC.  
 (KORK-TV), LAS VEGAS, NEVADA

For Renewal of License

LAS VEGAS VALLEY BROADCASTING CO.,  
 LAS VEGAS, NEVADA

For Construction Permit for New Television  
 Broadcast Station

*Appearances*

*Edgar F. Czarra, Jr., Michael S. Horne, J. Peter Luedtke and Thomas Houston* (Covington and Burling) on behalf of Western Communications, Inc.; *Gerald S. Rourke and Raymond J. Shelesky* (Welch and Morgan) on behalf of Las Vegas Valley Broadcasting Co.; *Michael H. Bader and John V. Kenny* (Haley, Bader and Potts) on behalf of witness, Edward R. Tabor; *Howard Monderer* on behalf of National Broadcasting Company, Inc., and on behalf of witness Donald Mercer; *Richard S. Rodin* on behalf of Summa Corporation; *Joseph De Franco* on behalf of Columbia Broadcasting System, Inc.; *Alan Naftalin* on behalf of witness, Victor E. Ferrall, Jr.; and *Henry L. Baumann, Gerald M. Zuckerman and W. Kennedy Keane* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE  
 CHESTER F. NAUMOWICZ, JR.

(Issued: June 14, 1974; Released: June 25, 1974)

*Preliminary Statement*

1. By orders of the Commission released June 12 and September 1, 1972, and of the Review Board released January 4, March 9 and March 23, 1973, the above-captioned applications were designated for hearing on the following issues:

"1.<sup>1</sup> To determine with respect to the application of Western Communications, Inc.

- (a) Whether the licensee engaged in fraudulent billing practices in violation of Section 73.1205 of the Commission's Rules and Regulations, by certifying to the National Broadcasting Company in certain documents that the licensee broadcast certain network programs in their entirety, including commercial content, whereas the licensee had deleted certain network commercial advertisements in the programs certified as having been broadcast in their entirety;
- (b) Whether in the course of the Commission's inquiry the licensee made misrepresentations to the Commission or was lacking in candor regarding its policies or practices in joining network programs after their beginning, leaving network programs before their end, or extending network station or commercial breaks so as to affect the content of network programs;

<sup>1</sup> For convenience, the issues quoted in the text above have been renumbered in the order they are to be considered in this Initial Decision.

- (c) Whether in light of the evidence adduced under the preceding issues, Western Communications, Inc. is qualified to remain a licensee of the Commission;
  - (d) To determine in the event that it is concluded that Western Communications, Inc., is qualified to remain a licensee of the Commission, what impact, if any, the evidence adduced under issues 1(a) and 1(b) would have upon its comparative evaluation.
- "2.(a) To determine whether the American Television Co., Inc., former licensee of Station KFSA-TV, Channel 5, Fort Smith, Arkansas, owned wholly by Donald W. Reynolds, engaged in fraudulent billing practices in violation of Section 73.1205 of the Commission's Rules and Regulations, by sending invoices to distributors and manufacturers representing charges for advertising in excess of the amounts actually charged a local advertiser, and by certifying to the CBS and NBC Television Networks in certain documents that the licensee broadcast certain network programs in their entirety, including commercial content, whereas the licensee had deleted portions of said programs, including certain network commercial advertisements in the programs certified as having been broadcast in their entirety.
- (b) To determine whether Nevada Radio-Television, Inc., licensee of Station KOLO-TV, Channel 8, Reno, Nevada, owned wholly by Donald W. Reynolds, engaged in fraudulent billing practices in violation of Section 73.1205 of the Commission's Rules and Regulations, by certifying to the CBS Television Network in certain documents that the licensee broadcast certain network programs in their entirety, including commercial content, whereas the licensee had deleted certain network commercial advertisements in the programs certified as having been broadcast in their entirety.

- (c) To determine the effect, if any, of the evidence adduced under the foregoing issues, considered individually or together with the evidence adduced under Issues 1(a), (b) and (c), on the comparative qualifications of Western Communications, Inc. (KORK-TV).
- "3. To determine whether the programming of Station KORK-TV, has been meritorious, particularly with regard to public service programs.<sup>2</sup>
- "4. To determine whether Las Vegas Valley Broadcasting Company can reasonably expect to secure a network affiliation and, if not, the effect on Valley's financial qualifications and its ability to effectuate its program proposal.
- "5. To determine the terms and conditions of the proposed bank loan from Nevada State Bank relied upon by Valley, whether Valley can meet the terms and conditions, and whether, in light thereof, the proposed loan will in fact be available to it.
- "6. To determine all the facts concerning Valley's proposed microwave relay service and their effect on its financial qualifications.
- "7. To determine the cost, terms and conditions which must be met by Valley to obtain access to its proposed transmitter site and their effect on its financial qualifications.

<sup>2</sup> This issue was added by order of the Review Board released January 4, 1973. In a subsequent order released June 22, 1973, the Board ruled that "consideration of . . . evidence [under the issue] has been rendered moot." However, that order did not actually delete the issue. On June 29, 1973, Western filed an application for review of the Board's June 22, 1973 ruling, but that application has not yet been acted upon. Under the circumstances, although the issue remains formally designated, no evidence has been adduced thereunder.

- "8. To determine in view of the facts adduced pursuant to the foregoing issues, whether Valley is financially qualified to construct and operate its proposed station.
- "9. To determine whether Mr. Meyer (Mike) Gold, Vice President, Director, 12.5% stockholder/subscriber and proposed full-time General Manager of Las Vegas Valley Broadcasting Company, made misrepresentation to the Commission, or exhibited lack of candor, concerning his reasons for assigning his licenses for KLUC and KLUC-FM in December 1969, and the effect of these matters on the basic or comparative qualifications of Valley to be a licensee.
- "10. To determine which of the proposals would better serve the public interest.
- "11. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applicants should be granted."

2. The applicants published notice of the hearing and notified the Commission thereof pursuant to the governing statute and rules. Conferences and hearings were conducted on various dates between October 13, 1972 and January 31, 1974. The record was finally closed by order of the presiding Judge released May 23, 1974. The filing of Proposed and Reply Findings of Fact and Conclusions of Law was concluded by May 24, 1974.

#### Issue 1(a): Fraudulent Billing

3. Throughout the last license period KORK was an affiliate of the National Broadcasting Company. The affiliation contract provided, in pertinent part, that KORK would not:

"... without NBC's prior written authorization make any deletions from or additions to any program fur-

nished to you hereunder, or broadcast any commercial or other announcements during any program."

"... delete any NBC Television Network identification, program promotional or production credit announcement within a Network program period, including any such announcement at the conclusion of an NBC Television Network program except for announcements promoting a network program which is not to be broadcast by the station. For any such deleted promotional announcements you shall substitute only other NBC Television Network or Station program promotional or public service announcements."

The contract also specified that:

"The placement and duration of station-break periods provided for locally originated announcements between NBC Television Network programs, or segments thereof, shall be designated by NBC. The station will broadcast each program which it has accepted from the commencement of network origination until the commencement of the terminal station break."

4. Each week KORK submitted Station Reports to NBC. The reports were on a form furnished by the network. The form listed the network programs and commercials available the previous weeks and included a column to be filled out by KORK listing which programs or commercials the station did not broadcast. The reports, which were attested by the affidavit of the general manager, furnished the basis for calculating the compensation due KORK from NBC.

5. During the last license period, October 1, 1968 to September 30, 1971, the general managers were Edward R. Tabor from the start of the period to May 1, 1971 and thereafter Robert N. Ordonez. The record indicates the Station Reports which these men attested were generally inaccurate, and that failures to carry portion of programs or commercials were not reported to NBC.

6. Prior to the installation of a microwave link to NBC's station in Burbank, California in 1965, KORK received its network programs on film or tape. Under this system it was possible for KORK to insert extra local commercials without the necessity of deleting any part of the material furnished by the network. The only effect was to delay the actual moment at which programs started by the amount of time consumed by the extra commercials inserted earlier in the broadcast day.

7. However, with the advent of the microwave link in 1965, KORK was broadcasting the network programs live, and it could no longer insert extra local commercials without deleting a portion of the material supplied by the network. This, the station undertook to do as a matter of policy and general practice.

8. At the beginning of each session NBC sent to KORK its new program schedule and also specified the times to be allotted to KORK for local commercials. Mr. Tabor would then decide which breaks would be extended to accommodate extra local commercials. He would extend the breaks from 10 to 60 seconds beyond the time authorized by the network, and the station's salesmen would sell on the basis of the time availability he thereby established.

9. Mr. Tabor testified that his policy was not to delete or clip network commercials or portions of the actual program. His intention was that only network "clutter" would be clipped. By "clutter" he referred to network transmissions of such things as opening or closing credits; the opening "Peacock" which NBC used at that time; opening slides, films, theme music, etc. used to identify particular programs; and various forms of brief network, program or sponsor identifications or promotions. Tabor acknowledged that the advance material received from the network did not allow the station personnel to know with certainty exactly how much "clutter" would be within a given program or exactly when it would occur. He relied upon the

familiarity of his operators with the format of the various network programs. He expected them to be able to predict when "clutter" would be presented within a given program.

10. KORK's operators were instructed to be as unobtrusive as possible in selecting the instant at which they would leave the network early or rejoin it late. They were not to interrupt a sentence or otherwise make the breaks at such a time as might alert the audience to the fact that a portion of the network transmission had not been broadcast.<sup>3</sup>

11. It is apparent that KORK's policy to clip network "clutter" was in deliberate violation of the terms of its contract quoted at paragraph 3 *supra*. It is equally apparent that its failure to report such clipping in its weekly Station Reports rendered those reports into misrepresentations. Moreover, the presiding Judge is unable to believe that experienced broadcasters truly expected that the clipping could be limited to only what they define as "clutter." On the one hand, the extra local commercials which it sold were of a specific duration. On the other hand, the station had no way of knowing with certainty exactly what the network would be transmitting at the exact moments which had to be clipped to accommodate the extra commercials. Even if only "clutter" was eliminated on most occasions, it was inevitable that there would be times when integral portions of the program and of network commercials would fall into the moments which had to be clipped to permit the broadcast of the prescheduled local commercials.

12. This record establishes that, in fact, the clipping of network commercials was a common occurrence. NBC and its Station KNBC-TV run a combined operation in Burbank, California. Computers at Burbank simultaneously transmit network programs to KNBC-TV and to KORK,

<sup>3</sup> This practice resulted in the loss of additional portions of network presentations. If, at the end of an extra local commercial, the moment was not suitable to rejoin the network a station identification slide would be flashed until a suitable moment arrived.

among others. Thus, when both stations are hooked into the network both should be broadcasting the same material at the same time. A comparison of the logs of the two stations revealed that was often not the case.<sup>4</sup>

13. The Broadcast Bureau undertook to compare KNBC-TV and KORK logs for 15 network programs during the last license period. During those programs KORK clipped all or part of 21 network commercials.

14. Valley undertook a more extensive study of KORK's programming. It analyzed 28 weeks of logs during the last license period. That analysis indicated that during those 28 weeks KORK clipped all or part of approximately 250 network commercials. While Valley's study was shown to be not entirely free of flaws, it does buttress the Bureau's study, and permits the finding that during the last license period the clipping of network commercials was a regular, frequent practice of KORK. However, no Station Reports from KORK to NBC were introduced covering the weeks Valley analyzed. Hence, it is impossible to say whether KORK did or did not report to NBC that it failed to broadcast the network material which it had clipped.

15. The record also establishes that KORK's practice of joining network programs late, leaving them early, and extending mid-program breaks was quite extensive. The Broadcast Bureau presented evidence of 41 occasions when KORK joined a network program from 7 to 30 seconds late. Valley's 28-week analysis revealed some 200 other late joins, and over 500 occasions when programs were left early. Some of the instances involved only 1 or 2 seconds, but others ranged up to 30 seconds. The Bureau established

<sup>4</sup> Log comparison constitutes less than perfect evidence. Any difference in the clocks in the two studios, or any inaccuracy in reading those clocks by either log keeper could lead to apparent discrepancies where none existed. Nevertheless, when KORK was off network for significantly longer time intervals than authorized, comparison of the logs permits ascertaining with reasonable certainty just what network programming it failed to broadcast.

14 occasions on which mid-program breaks were extended by from 20 to 50 seconds. Valley's study showed over 500 mid-break extensions ranging from a few seconds to a full minute.

16. None of the deviations involved in the Broadcast Bureau showing were acknowledged in the weekly Station Reports sent to NBC. Indeed, on two occasions when KORK was off-the-air, once for 17 minutes and 45 seconds and once for 50 minutes, the Station Report indicated that the network programming being transmitted at the time had been carried.

17. Mr. Tabor justified KORK's conduct on the ground that clipping was a common practice at the time he authorized it. His opinion was shared by other KORK employees who testified that they had personally observed clipping on the other two Las Vegas network affiliates.<sup>5</sup> Moreover, as discussed at paragraphs 44-55, *infra*, it appears that the practice was also being followed at other stations under common ownership with KORK.

18. Mr. Tabor testified, and he is uncontradicted, that he never advised his superiors in Western's corporate organization of his instructions to his staff to engage in clipping. However, the record indicates that higher echelons did have at least tacit knowledge of the practice. During the last license period Tabor's immediate supervisor was Donald W. Reynolds, Jr., who was Executive Vice President of Donrey, Incorporated, the owner of Western Communications, Inc. Mr. Reynolds, Jr., is the son of Donald W. Reynolds, the owner of Donrey, Inc. Reynolds, Jr., was responsible for the Donrey Media group which operated a number of broadcast and non-broadcast companies, including Western. Although he did not inquire into the specifics

<sup>5</sup> Official Notice is taken that in *In the Matter of Channel 13 of Las Vegas, Inc.*, 37 FCC 2d 518, the Commission determined that at or about the time KORK has been shown to have engaged in clipping, Station KSHO-TV, the ABC affiliate in Las Vegas, was engaging in essentially similar conduct.

of KORK's commercial practices, he assumed that KORK was overloading breaks because he believed it to be a common practice. His first acquaintance with a specific instance of clipping at KORK came in the fall of 1970 when he was called upon to deal with a viewer's complaint regarding a commercial which interfered with the broadcast of a World Series baseball game. However, it does not appear that at that time he pursued the matter to determine just how extensive the practice was.<sup>6</sup>

19. By the time Mr. Ordonez took over as general manager on May 1, 1971, the corporation was beginning to evince some concern as to clipping. Prior to his appointment to KORK, Ordonez had been General Manager of Donrey's Station KFSA-TV in Fort Smith, Arkansas. When Mr. Reynolds, Jr. promoted him to KORK, he told him to look into a possible problem with over-commercialization in Las Vegas. Mr. Ordonez asserted that almost immediately after his arrival in Las Vegas he commenced an investigation of the situation. On May 18 or 19 he received a report on the matter, and issued orders that overloading during prime time be ceased the following day. In order to establish time availability for excess commercials which had already been contracted for in prime time, KORK preempted several network programs during June 1971. Feature films were run in their stead because such films allowed the station to allocate however much advertising time might be needed during their presentation.

20. In July, 1971, following another Commission inquiry into the matter, Mr. Ordonez eliminated overloading during daytime hours.

<sup>6</sup> As part of his supervisory performance Reynolds, Jr. required of Tabor that he up his sales and income projections for the station. Since he must have known KORK's rate card and time availabilities, and since he was aware that KORK was overloading breaks, his demand for increased sales and income can only be construed as implied approval of the practice.

21. On January 19, 1973, some 7 months after this case was designated for hearing, Western wrote to NBC. It stated that in the course of preparing for this hearing it had determined that some or all of certain network commercials had been missed. It offered to recompense NBC for those commercials enumerated in the Broadcast Bureau's Bill of Particulars which followed the order of designation. It also offered recompense in such amount as NBC might deem appropriate for any non-commercial network programming as had not been broadcast. Finally, it asked for copies of its Station Reports over the last license period (its own copies having been destroyed by fire) in order that it might compare them with its logs to determine whether any material not specified in the Bill of Particulars had been deleted.

22. On January 30, 1973, NBC replied stating that KORK had received \$324.36 for the commercials listed in the Bill of Particulars. With respect to the non-commercial programming which was clipped, it stated that NBC did not suffer any specific financial loss and, although it regarded such deletions as a violation of its contract with KORK, it did not regard restitution as necessary in view of the station's abandonment of the practice of clipping.

23. On February 5, 1973, Western paid NBC \$324.36 in recompense of what it had received for the deleted network commercials. It also undertook a comparison of the Station Reports with its own logs in order to determine whether any other commercials might have been missed. As of the time of the close of this record that study had not been completed.<sup>7</sup>

#### Issue 1(b): Misrepresentation

24. In the course of the Commission's investigation into KORK's clipping practices several representatives of the

<sup>7</sup> Had the study been completed in time to be included in this record, it would have served to confirm or rebut Valley's study discussed at paragraph 14-15, *supra*.

licensee submitted letters to the Commission. Certain factual statements in those letters form the basis for the issue alleging misrepresentations and lack of candor.

25. On October 29, 1970, the Commission directed a letter to KORK enclosing a letter of complaint received from a viewer. The complaint alleged that during the 1970 World Series KORK extended its commercials during station breaks to the extent that it was returning to the games after they were in progress. The Commission inquired of KORK:

"Did or does station KORK-TV insert advertising in network programs at other than the scheduled times for advertising or join the program late in such a manner as to affect the program content of such broadcasts? If so, please state when and under what circumstances this occurs and whether it is the policy of the licensee to insert commercial or other material in programs, join them late or leave them early with such effect."

26. A copy of the Commission's October 29, 1970 letter was sent to KORK's Washington communications counsel where it was handled by Mr. Victor E. Ferrall. On at least two occasions Ferrall telephoned KORK's then General Manager, Edward Tabor. On the basis of those conversations Ferrall prepared a letter which he filed with the Commission on November 6, 1970 over his own signature.

27. Ferrall's letter stated in pertinent part:

"During each of the World Series games, there were two between-inning breaks reserved for local advertising announcements. Although the length of the breaks was such as to require the use of 20 second announcements, the program director had available to him only 30 second announcements which he used in those few local breaks. The result was that the com-

mercial time broadcast by the station in the two breaks was slightly longer than the break and a few seconds of sports programming was lost.

"The general manager of the station was out of town on business at the time the World Series was broadcast. When he returned to the station long before [the] complaint letter was received, he learned what had happened and severely reprimanded the program director.

"It is the firm policy of KORK-TV to limit the length of commercial announcements to the available break time and not to carry advertising in such a manner as to affect program content. The station realizes that strict adherence to this policy can be of particular importance to viewers of sporting events. KORK-TV regrets the isolated incident about which Mr. Lockhart complains...."

28. The record reveals facts quite different from those stated and implied in the November 6, 1970 letter. With respect to the assertion that the length of the breaks required 20 second announcements but that the station had only 30 second commercials available, the TWX which KORK received from NBC informed it that 32-second breaks would be available at the end of the 5th and 7th innings. Thus, if KORK had only 30-second spots available, it was on notice that it had time to broadcast *one* such commercial plus a 2-second station identification at each break. In the event, it actually sold and broadcast *three* 30-second spots plus a 2-second station identification of each break. It is found that its assertions regarding this matter in its letter were factually false and designed to mislead the Commission as to what happened and why.

29. Whereas the letter asserts that the general manager "severely reprimanded" the program director for this specific incident, Tabor testified at the hearing that, al-

though he discussed the matter with the program director, "I wouldn't necessarily say I severely reprimanded him." While this misstatement in the letter may appear at first glance to be immaterial puffery, the presiding Judge views it more seriously. Since, as noted at paragraph 7 and 8 *supra*, Tabor had made the overloading of network breaks a matter of policy and practice, he is most unlikely to have "severely reprimanded" a subordinate for carrying out that policy. The statement that he did so is found to be an attempt to mislead the Commission into believing that KORK's management regarded the overloading as unusual and culpable.

30. Finally, the station's expression of regret over the "isolated incident" is found to be both hypocritical and false. The record shows that during the other four games of the 1970 World Series KORK overloaded the network breaks essentially as it did during the first game. During the four games of the 1968 World Series the station consistently extended the 32-second 5th and 7th inning breaks to 62 seconds. During the first network baseball game of the 1971 regular season NBC again TWXd KORK that two 32-second breaks would be available. The stations, however, took a 65-second break after the 5th inning and a 55-second break after the 7th. Thus, far from being an isolated incident the occurrence which was the subject matter of KORK's November 6, 1970 letter was a typical result of the station's policy of overloading network breaks.

31. On March 8, 1971, another Las Vegas viewer wrote to the Commission to complain that on that date KORK had covered a portion of a network program with a local commercial.<sup>a</sup> On April 8, 1971, the Commission forwarded

<sup>a</sup> The network program was "Laugh-In," the format of which involved rolling closing credits superimposed on a series of short jokes recited by the performers. It was this portion of the program which was clipped.

this complaint to KORK with a letter which inquired in pertinent part:<sup>\*</sup>

"Did or does Station KORK insert advertising in network programs at other than the scheduled times in such a manner as to affect the program content of such broadcasts? If so, state when and under what circumstances and whether it is the policy of the licensee to insert commercial or other material in programs, join them late, or leave them early with such effect."

It should be noted that this inquiry is very limited in its area of interest, although less than precise in the terms it employs. It does not ask the general question whether any network program material has been clipped, but rather the specific question whether such material has been clipped in such a manner as to affect the program content. However, it does not define the term "program content," and the presiding Judge is unaware of any generally understood usage of that term in the broadcast industry.

32. Again Ferrall consulted with Tabor by telephone to ascertain the facts and on April 21, 1971 replied by letter over his own signature. His letter stated in pertinent part:

"In response to the question asked by the Commission, it is the policy of KORK-TV *not* to insert advertising in network programs at other than the scheduled times in such a manner as to affect the program content of such broadcast. Of course, on occasion, errors do occur. When they do steps are taken in order

<sup>\*</sup> This Initial Decision neither quotes nor considers those portions of the Commission's letters of inquiry which in effect instruct the licensee to tell all about the incident involved. What constitutes "all" the facts is a subjective matter about which reasonable men might differ. A licensee is not to be faulted for assuming that the Commission is interested only in that about which it specifically inquires and to answer on that basis.

to attempt to insure that they will not be repeated. The management of the station takes a very stern view of such oversights.

"In connection with the particular complaint transmitted by the Commission, the commercial matter was broadcast in error. The member of the station's staff responsible for the mistake has been severely cautioned not to permit such errors in the future."

33. Due to the very limited nature of the Commission's inquiry and its use of the undefined term "program content," this response of KORK comes near to being the literal truth. It was during the Ferrall/Tabor conversations regarding this incident that Ferrall was first told of KORK's practice of clipping network "clutter" as defined at paragraph 9, *supra*. Since Ferrall did not regard such material as being "program content" within the meaning of the Commission's letter of inquiry, he did not deem it necessary to discuss the practice in the response he prepared. However, it appears that Tabor did not brief Ferrall quite fully enough on the mechanics of KORK's clipping, and Ferrall's lack of knowledge led to statements in the letter which were not in accord with the facts.

34. At paragraph 10 and footnote 3, *supra*, it has been noted that KORK's operators were instructed to be unobtrusive in inserting the extra local commercials. In other words, although the station's official policy was not to clip "program content," it was aware that there would be times when the extra commercials would intrude on the network programs. Hence, it was necessary to issue instructions to the operators to leave and rejoin the network in such a manner as to leave the viewers unaware that there had been an unauthorized absence. In short, policy did not and could not accord with practice, and the statement that it is "not the policy of KORK-TV to insert advertising . . . in such a manner as to affect the program content" asserts a station policy unrelated to what was actually being done.

35. On May 14, 1971, the Commission again wrote KORK on the subject of overloaded network breaks. This time the Commission's letter was motivated by a viewer complaint as to the commercial practices of all of the Las Vegas commercial television stations. The Commission's letter inquired:

"The licensee has stated that it is not its policy to insert commercial material during network programs at other than the scheduled times so as to affect the program content of such broadcasts. However, complaints have been received over a period of approximately six months indicating that there has been a continuing pattern of operation of KORK-TV with respect to network programs having the effect of reducing program content. You are requested to submit a statement setting forth in detail the procedures you have adopted or intend to adopt to prevent recurrence of the practices complained of."

36. At about the time it received the Commission's May 14 letter, KORK became aware that the same viewer who had complained to the Commission, Donald W. Hendon, had circulated among advertising agencies a document alleging that the Las Vegas television stations were broadcasting commercials which interfered with program content. On Ferrall's advice, Ordonez initiated an investigation of the allegations. On May 20 he reported to Ferrall that he had determined that the network breaks were too full of local commercials to avoid the possibility of switching errors. He proposed to correct the problem by reducing the number of local commercials scheduled during breaks.

37. On June 1, 1971, KORK responded to the Commission's May 14 inquiry with a letter signed by Mr. Ordonez. In pertinent part that letter stated:

"The two earlier complaints referred to in the Commission's letter related to isolated operation errors.

... The policy of KORK-TV not to broadcast commercial matter so as to affect program content has been continuously in effect for many years and is unchanged. ... [However] scheduling requirements are tight and require alertness and exact switching by the operator on duty. In those circumstances, operator errors have in the past occasionally occurred.

"The potential problem of commercial matter interfering with program content is compounded by the fact that local advertising agencies in Las Vegas are not always careful about meeting precise commercial announcement length requirements. As a result, the announcements which they make are not infrequently several seconds too long.

"The problem of operator error has been one which has deeply concerned the station. Repeated efforts to insure the elimination of such occasional errors by strict enforcement of prelogging and switching accuracy requirements have been made.

. . . .

"As a result of [complaints and a review described in the letter], the station has put into effect a policy of reduced commercial matter during heavy commercial periods. That is to say, the station will now carry less commercial matter during local breaks within and between network programming where such errors can occur. The result of this new policy will be substantially to relax the switching tolerance requirements, thereby eliminating the likelihood of switching errors except resulting from gross operator negligence.

. . . .

"While, of course, there is no way in which occasional operator errors can be insured against absolutely, the station believes that it has taken every possible and

reasonable step to insure that commercial matter will not interfere with program content."

38. Summarized, this letter asserted and implied that the station had a tight but workable schedule of local commercials during network breaks and that network programs were covered only as a result of the failure of individual operators to maintain the schedule. Such explanation is simply untrue. It must have been as apparent then to the station's executives as it is apparent now to the presiding Judge that if approximately 90 seconds of local commercials were scheduled during a break of approximately 30 seconds something would have to be covered. Assuming perfect switching, some 60 seconds of network transmission had to be lost. Hopefully, it would only be what KORK has described as "clutter," but there was always a risk that other program material would be left out. While it is entirely possible that operator error may have compounded the problem, the root cause of the trouble lay in the scheduling, not the switching. For KORK to suggest otherwise in its letter is found to be a deliberate misrepresentation designed to deceive the Commission as to the actual situation which existed.

39. On June 30, 1971, Mr. Hendon again wrote a letter of complaint to the Commission wherein he described specific incidents of interference with network programming on KORK. By letter of July 15, 1971, the Commission solicited the station's comments. On August 2, 1971, Mr. Ordonez replied. He explained what had transpired with respect to each incident of which Mr. Hendon complained. He stated the KORK's operating practices "accord exactly" with the station's prior representations to the Commission and described in some detail the steps which had been taken to correct the problem.

40. On June 2, 1972, Mr. Tabor executed an affidavit designed to clarify the letters that had been sent to the Commission while he was general manager. In essence he ex-

plained that he thought the Commission's reference to program content indicated an interest only in those portions of the program which were actually part of the subject matter of the presentation. He did not think the Commission was concerned with the sort of material which he described as "clutter." Hence, he regarded the responses which were sent to the Commission as being accurate. However, he has since revised his view and concedes that what the Commission was seeking was information as to whether any network programming at all was covered. Messrs. Ferrall and Ordonez adopt essentially the same position. Thus, all three men attribute any imperfections in the KORK letters to semantic misunderstandings and maintain that the letters for which they were responsible were intended at the time they were written to be accurate and responsive to the Commission's inquiries.

41. The presiding Judge is unable to accept the representations at face value. It is plain that the Commission was responding to viewers' complaints by inquiring of KORK just what it was doing on network breaks. It is equally plain that the station's general managers knew that the station as a matter of policy and practice was scheduling more local commercials than could be accommodated in the authorized break time. Nevertheless, none of the station's letters acknowledge this fact, and there is a consistent pattern of attempting to blame the problem on switching errors by operators. It is found that not only are KORK's letters individually deficient as heretofore noted, but that they form a pattern of attempting to mislead the Commission as to the station's commercial practices and the results to which they led.

42. The record does not indicate that any of KORK's general managers' superiors in the corporate chain of command participated in the preparation of or had specific knowledge of the correspondence between the Commission and the licensee. Mr. Reynolds, Jr. was aware of the com-

plaints, and knew generally that correspondence with the Commission was being conducted relative thereto. However, it does not appear that the matter came to the attention of Mr. Reynolds, Sr., until some time later when his attempt to purchase a television station in Tuscon, Arizona ran into difficulty because of the Commission's concern with overloading at existing Donrey stations.

#### Issues 1(c) and 1(d): Effect on Western's Qualifications

43. These issues are conclusionary and no findings relative thereto need be made.

#### Issue 2(a): Station KFSA-TV, Fort Smith, Arkansas

44. During that portion of 1971 hereinafter discussed, Station KFSA-TV was under the ultimate ownership of Mr. Reynolds, Sr. and was supervised by Mr. Reynolds, Jr. The station was an affiliate of all three national networks.

45. Although the evidence is considerably less extensive and even less clear than with respect to KORK, the record indicates that KFSA was also clipping network commercials and failing to report that fact to the network. For example, on ten occasions between March 3 and 19, 1971, the station clipped approximately one minute from the end of the CBS evening news program. The clipped portion of the program included commercial material for which the station substituted a tease for its local news program, a local commercial and the beginning of the local news. The clipping was not reported to the network and the station accepted compensation for the commercials it had failed to broadcast.

46. The record indicates that there may have been other network commercials which the station covered. However, the facts must be inferred from a comparison of various records kept by the station, the network and the network's owned station, and the presiding Judge does not deem the evidence to be sufficiently clear to warrant a firm finding.

47. Between August of 1970 and May 1, 1971, KFSA's general manager was Mr. Ordonez, whose previous experience had been in radio. He first became aware that the network breaks were being overloaded around February of 1971, as a result of policies instituted by his predecessor. However, it does not appear that he took any steps to halt the practice when it came to his attention.

48. For several months following Mr. Ordonez's departure, Mr. Reynolds, Jr. served as acting general manager of KFSA. Early in June, 1971 he issued instructions regarding station breaks which, although reducing the clipping, contemplated that the overloading of breaks would continue. It was his intention to eliminate clipping at the start of the new network season in the Fall of 1971, but, in the meantime, he allowed the practice to continue. He asserts that he did not know at the time that the overloading involved clipping network commercial matter, although it is unclear how as acting general manager he could have known that clipping was going on without knowing what was being clipped.

49. There is no evidence that Mr. Reynolds, Sr. was apprised of the problem at KFSA prior to August or September of 1971.

50. Nor is there record evidence supporting the allegation that KFSA sent invoices to distributors and manufacturers representing charges for advertising in excess of the amounts actually charged a local advertiser. It appears that between January and July of 1971 the station's then sales manager secured blank station invoices to which he signed Mr. Ordonez's name followed by his own initials and the notarization of another employee. He then gave the blank invoices to a local advertiser. However, there is no evidence in the record showing that those blank invoices were actually filled out by the local advertiser and submitted to any manufacturer or distributor. More importantly, the record indicates that his action was contrary to

specific written station policy and was taken without the knowledge of his superiors at the station. Under such circumstances, it is not found that KFSA engaged in double billing.

#### Issue 2(b): Station KOLO-TV, Reno, Nevada

51. During that portion of 1971 hereinafter discussed, Station KOLO-TV, Reno, Nevada was under the ultimate ownership of Mr. Reynolds, Sr., and was supervised by Mr. Reynolds, Jr. The station was an affiliate of the CBS network.

52. The record indicates that on several occasions between February 1 and May 17, 1971, the station covered all or part of certain network commercials during the daytime program "As the World Turns" and may have covered all or part of others.<sup>10</sup> These omissions were not reported to CBS on those KOLO reports on which the station's network compensation was based.

53. Since August of 1970, KOLO had been under the general managership of Mr. James C. Herzig, a former employee of KORK. Some months after he arrived at KOLO he instructed his traffic department that no more than three local commercials were to be run in any one network break. Since the station sold commercials of up to 30 seconds in prime time and up to 60 seconds during daytime, his instructions created the possibility of the station taking breaks of up to 90 seconds during prime time and up to 3 minutes during daytime.

<sup>10</sup> Accurate findings as to just what was covered are difficult. The facts can be ascertained only by comparison of network records of what should have been broadcast at a given moment, the logs of a network owned station as to just what it actually broadcast at that moment, and the logs of KOLO. In evaluating those three independent records, consideration must be given to possible discrepancies in clocks and imperfections in the reading of those clocks by individual operators. In view of those uncertainties, this Initial Decision will make only the generalized findings contained in the text above.

54. Mr. Herzig did not believe that his policy would result in the clipping of anything but what has been described as "clutter," but the record does not indicate that he investigated the matter. He did not issue instructions as to what should be shown on the station's discrepancy report when network material was clipped. He did not review the discrepancy reports to see what the station was actually reporting to the network. It is found that KOLO adopted a policy which contemplated the clipping of network programming, and which any experienced broadcaster must have known would inevitably lead to the clipping of network commercial material from time to time. It is further found that this policy resulted in the clipping of network commercial material, and that the management of the station took no steps reasonably calculated to make certain that the network was properly advised.

55. Mr. Herzig was under the general supervision of Mr. Reynolds, Jr. The record is vague as to what Herzig may have told Reynolds about clipping at the time, but it appears unlikely that either Mr. Reynolds or his father was acquainted with the specifics of the overloading at the time it occurred.

#### Issue 3: Meritorious Programming

56. As indicated at footnote 2, *supra*, no evidence directed to this issue has been adduced.

#### Issue 4: Valley's Network Affiliation

57. Valley has proposed to replace KORK as an NBC affiliate. However, it has no assurance of any kind from NBC that the affiliation will be available, and, in any event, NBC will not commit itself to affiliate with a new station more than 6 months prior to such stations going on the air. Valley's expectation of receiving the affiliation rests on its belief that its proposed operation would offer NBC the most attractive option available to it in Las Vegas.

58. NBC's Vice President for Station Relations testified as to the factors the network considers in making an affiliation. The prime factor is the station's ability to deliver an audience unduplicated by another NBC affiliate. However, the network also considers equipment quality, the type of local and syndicated programming planned, staffing and promotional plans, prior experience in the market, the financial stability of the applicant, and the principals' success in other fields. The network also desires to continue its channel identification in the market, although the factor is not controlling. The network also gives consideration to the fact that a new station tends to have more problems than does an established station which is merely changing affiliation.

59. In the event KORK should fail to secure renewal of its license, NBC does not lean toward or away from any individual alternative. In 1972 Station KVVU, the existing independent VHF Station in Henderson, Nevada, which is considered part of the Las Vegas market, approached NBC seeking affiliation. The network declined to affiliate, but would reconsider if KORK lost its license. It would also consider the possibility of affiliating with the present Las Vegas affiliates of CBS and ABC, as well as any successor to the KORK facilities.

60. Other than the stations assigned to Las Vegas and Henderson, no commercial television stations provide Grade B service to any part of Las Vegas. The comparative Grade B coverage of the various facilities is as follows

Facility	Grade B Population	Valley Advantage
KLAS-TV .....	289,781	6,061 (2.1%)
KVVU .....	278,700	17,142 (6.2%)
KORK-TV .....	270,079	25,763 (9.5%)
KSHO-TV .....	267,717	28,125 (10.5%)
Valley .....	295,842	

61. Part of Valley's service advantage over the existing stations lies in the fact that it would serve the towns of Kingman, Arizona (7,312) and Needles, California (4,051). None of the existing stations serve Needles, and Kingman is outside of all their Grade B contours except that of KLAS-TV. However, both communities receive NBC network service through translators rebroadcasting the signal of NBC affiliate KTAR-TV, Phoenix, Arizona. Hence, service to these communities would not truly be unduplicated insofar as NBC is concerned. If the population of those towns are deducted from the total population within Valley's Grade B contour (and the population of Kingman from the KLAS contour) the unduplicated network coverage of the stations would be as follows:

Facility	Grade B Population	Valley Advantage
KLAS .....	282,069	2,410 (0.9%)
KVVU .....	278,700	5,779 (2.1%)
KORK-TV .....	270,079	14,400 (5.3%)
KSHO-TV .....	267,717	16,762 (6.3%)
Valley .....	284,479	

62. Valley proposes to operate with all color facilities and a substantial staff. It plans a promotion campaign for its new stations, although the details have not been worked out.

#### Issue 5: Valley's Bank Loan

63. Valley proposes to secure a \$1,000,000 loan from the Nevada State Bank, Las Vegas, Nevada. The conditions of the commitment are set forth in two letters from the bank. The first, dated August 23, 1971 states:

"You have requested the Nevada State Bank, in conjunction with a correspondent bank to lend Las Vegas Valley Broadcasting Co. up to \$1,000,000.00 provided you are successful in obtaining approval from the Fed-

eral Communications Commission to construct and operate a commercial television on Channel 3 in Las Vegas.

"The loan would be repaid over a five year period and would provide for semi-annual payments of principal and interest, subject to negotiated extension thereof, with the first payment of principal due sixteen months from the date of the borrowing; interest shall be paid every ninety (90) days. Interest upon the loan would be the then current rate for commercial loans of this nature, which, for your information is presently 8½% per annum.

"It is understood that the proceeds of the loan will be used for acquiring land and equipment and for certain costs of construction and operation of the station.

"The collateral for this loan will be the assets of the station, provided that at the time of the loan, Las Vegas Valley Broadcasting Co. has paid in an unencumbered capital of a minimum of \$200,000.00.

"Based upon our review of the current financial statement of the stockholders of Las Vegas Valley Broadcasting Co., most of whom we are personally and favorably acquainted with, and our understanding of the value of an operating NBC network affiliated VHF television station in the Las Vegas market, the Nevada State Bank, in conjunction with a correspondent bank, would be willing to make such a loan, subject to the reasonable and ordinary banking conditions existing at the time of the loan."

The second letter, dated February 22, 1973 amended the first as follows:

"As you know, we are general counsel to the Nevada State Bank ('Bank'). The purpose of this letter is to

confirm our recent discussions concerning the loan agreement between Las Vegas Valley Broadcasting Co. ('Valley') and the Bank.

"On behalf of the Bank, I am authorized to confirm that at no time has the Bank withdrawn its letter of August 23, 1971, to Valley and that the Bank remains willing to make the loan pursuant to the terms stated in said letter.

"In accordance with our recent discussions, we have now agreed upon the following changes in the terms of the agreement:

1. Approval by the Bank and its correspondent bank, at the time of the making of the loan, of the personal financial statements of the stockholders of Valley, each of whom shall guarantee the payment of the loan.
2. In the event Valley obtains approval from the FCC to construct and operate Channel 3, it will accept this loan or such part thereof as it requires for the construction and initial operation of the station and in addition, will give the Bank a right of first refusal on all other financing required by it during the five year term of the loan.
3. During such five year loan term, Valley will maintain all of its bank accounts exclusively at the Bank.
4. The term "unimpaired capital" used in the Bank's letter of August 23, 1971, was intended to include stock issued by the corporation in return for funds paid in by the subscribers and such. The Bank realizes that the funds may be expended by Valley in prosecuting its application before the FCC.

5. The agreement of August 23, 1971, as amended hereby, shall continue in effect until January 1, 1975, but, at the sole option of the Bank, may be extended, in writing, for such additional periods as it may see fit.

"Please indicate your acceptance of these changes in the agreement contained in the letter of August 23, 1971, by signing and returning to me one copy of this letter."

64. The record indicates that Valley and its shareholders are willing to meet the bank's requirements insofar as they are able. However, it was subsequently developed that Valley intended to lease its land and buildings, hence, it would not have any real property to serve as collateral for the loan. It was further developed that Valley intended to purchase its equipment from RCA on credit, and that RCA's standard credit terms require that its equipment lien be exclusive. Hence, the equipment would not be available as collateral. In view of the obvious pertinence of these facts, interrogatories were served on the President of the Nevada State Bank. The questions and his responses were as follows:

- "1. Is the Nevada State Bank aware that Las Vegas Valley Broadcasting Co. (Valley) proposes to purchase up to \$1,470,000 worth of technical equipment for its station from RCA, and of the terms of such purchase as stated in a letter of August 25, 1971, from RCA to Valley?

"Answer: Yes.

- "2. Is the Nevada State Bank aware of the standard terms and conditions under which RCA makes credit available to purchasers of its technical equipment, including the exclusive lien which RCA retains on such equipment, as stated in the documents attached to the Tenth Motion to En-

large Issues filed in this proceeding by Western Communications, Inc.?

"Answer: Yes.

- "3. In view of the matters referred to in questions 1 and 2, does the Nevada State Bank remain willing to make its proposed loan of up to \$1,000,000 to Valley in accordance with the terms stated in the August 23, 1971, letter of Mr. Colvin S. Smith, Jr., and the February 22, 1973 letter of Samuel S. Lionel?

"Answer: Yes.

. . .

- "6. Is Nevada State Bank aware that Valley proposes to use part of the proceeds of the proposed \$1 million loan from Nevada State Bank to make a down payment of up to \$367,500 to RCA in connection with the proposed purchase of up to \$1,470,000 worth of technical equipment?

"Answer: Yes.

- "7. Is Nevada State Bank aware that Valley proposes to lease, rather than own, any land and buildings required for its proposed station?

"Answer: Yes.

. . .

- "9. Is Nevada State Bank willing to make the proposed \$1 million loan to Valley on the terms and conditions specified in the Colvin Smith letter of August 23, 1971, and the Samuel Lionel letter of February 22, 1973, if the collateral for the loan offered to the Bank by Valley does not include any land or buildings or any of the \$1,470,000 of broadcast technical equipment Valley proposes to

purchase from RCA Corp., but includes only (a) all personal property of Valley which was not encumbered by credit agreements with RCA, (b) assignment of Valley's accounts receivable after it begins operations, (c) pledge of all outstanding capital stock of Valley without the stockholders giving up any voting rights; and (d) personal guarantees of all Valley stockholders?

"Answer: If the conditions stated will in fact exist at the time the loan is required, Nevada State Bank will make the loan in accordance with the terms stated in the August 23, 1971 letter of Mr. Colvin Smith, Jr. and the February 22, 1973 letter of Samuel S. Lionel, if Nevada State Bank and its correspondent bank feel that those conditions, together with other conditions then existing make the loan a proper one.

- "10. Is the Nevada State Bank willing to loan Las Vegas Valley up to \$1,000,000 under the terms and conditions specified in the August 23, 1971, and February 22, 1973 letters if neither broadcasting equipment nor real property are available for collateral?

"Answer: If the conditions stated will in fact exist at the time the loan is required, Nevada State Bank will make the loan in accordance with the terms stated in the August 23, 1971 letter of Mr. Colvin S. Smith, Jr. and the February 22, 1973 letter of Samuel S. Lionel, if Nevada State Bank and its correspondent bank feel that those conditions, together with other conditions then existing make the loan a proper one.

"11. In addition to the personal guarantees by Valley's stockholders, what is the minimum value of collateral that the bank will require in order to loan Valley up to \$1,000,000 as proposed?"

"Answer: It will depend upon the conditions existing at the time the loan is required."

#### Issue 6: Valley's Microwave Relay Service

65. At present, there is no direct network feed to Las Vegas. Hence, it would be necessary for Valley to make some arrangement to receive the NBC signal from Los Angeles if it is to effectuate its proposal. Valley claims to have budgeted <sup>11</sup> \$200,000 for this purpose, although at the time the figure was allocated it had no specific plan as to how it would transport the NBC signal from Los Angeles to Las Vegas.

66. After the subject issue was added to the proceeding, Valley contacted a microwave common carrier, Western Tele-Communications, Inc. Western proposed to provide the requisite service at an approximate monthly rental of \$12,000 (\$144,000 per year). However, the price quoted is subject to change at such time as Western may have concluded detailed engineering and cost studies. The quotation also assumes that Valley will have made the necessary arrangements for equipment space and tower facilities at the NBC site on Mt. Wilson.

<sup>11</sup> Valley did not estimate costs in the conventional manner. It simply took the total expense figure for the four Las Vegas commercial TV stations for the previous year, assumed that its expenses would be somewhat more than average, and divided by three. The resultant figure became its estimated expenses. How this figure relates to the actual expense of Valley's planned activities is unknown to either Valley or the presiding Judge. However, since no issue has been directed to the point, it does not attain decisional significance.

#### Issue 7: Site Access

67. Valley proposes to locate its antenna on Black Mountain. The site is on federally owned land controlled by the Interior Department's Bureau of Land Management (BLM). Access would be via two private roads. The lower of the two is owned by the Bell Telephone Company of Nevada which would permit Valley to use the road on payment of \$1,500-2,000 annually to cover maintenance costs.

68. However, to get from the telephone company road to the actual antenna site, it is necessary to traverse a second road. The status and ownership of this road is murky.

69. BLM issued a permit to Hughes Tool Co. to construct the road. At that time Hughes Tool was the licensee of Station KLAS-TV, Las Vegas, and it needed the road to reach its then-proposed transmitter site on Black Mountain. Hughes Tool subsequently assigned its interest in KLAS to Summa Corporation. However, it has never assigned or purported to assign the BLM permit to anyone.

70. Summa Corporation and Western Communications, Inc. thereafter formed Alta Development Co. in which they are equal shareholders. It was Alta which actually built the road.

71. The permit from BLM to Hughes Tool contains the following provision:

"The United States reserves the right to grant other R/W uses for similar facilities on the identical or on lands adjacent to the lands described in R/W application N-5374, including rights of access. When such other R/W grants are made the grantees and Hughes Tool Company will make the necessary arrangements between themselves for use and maintenance of the access road."

72. At the time it filed its application specifying a transmitter site on Black Mountain, Valley, apparently relying

on the permit provision quoted at paragraph 71, *supra*, had made only the most casual efforts to ascertain what demands the owner of the access road would make on it for permission to share its use. It had no commitment of any kind from anyone. However, when the Review Board released its order on March 9, 1973 directing inquiry into the matter Valley proceeded to explore the matter more diligently.

73. Initially, Alta, acting at the direction of its 50% shareholder, Western, was unresponsive to Valley's inquiries. However, at a hearing session of July 25, 1973 counsel for Western stated the terms upon which Alta would permit Valley to use the road. The thrust of his remarks was that Valley would be required to purchase a proportionate share in the total Alta investment as of the time of purchase. He asserted that such total investment as of the date he spoke was "in the neighborhood of \$200,000 and it will doubtless increase from year to year."

74. Thereafter, Valley amended its application to provide \$100,000 in shareholder loans to meet the costs of buying into the site and its access road. However, it was shortly revealed that the year to year increase predicted by Western's counsel would be substantial.

75. On November 6, 1973 Western introduced an exhibit projecting the amounts at which it would sell its share in Alta to Valley at various dates. Its calculations included such things as an inflation factor to make the dollars it received worth the dollars it had invested, plus an annual return of 10% on its investment. Using these figures it calculated that Alta's total investment as of September 30, 1973 was \$235,571 of which Valley's share would be \$117,789.50. It projected the asking price to Valley as of September 30, 1974, 1975 and 1976 at \$138,394.50, \$162,272.50 and \$189,937.50.

76. Valley responded by contending that the asking prices were unreasonable, and arguing that the BLM which had

issued the permit would authorize it to use the road without meeting the demands. To that end it engaged in correspondence with and called a witness from the BLM.

77. On November 5, 1973 the BLM wrote to counsel for Valley. In pertinent part the letter stated that "if a formal grant of right-of-way issues, it will be subject to the valid existing right. . . ." Finding this response less than definite, Valley's attorney wrote the BLM on November 19, 1973 and inquired: "Will Valley be forced to accept the terms dictated by KLAS-TV for use of its road in order to obtain a right of access from the Bureau of Land Management, or will the Bureau grant Valley a right of access and leave it to KLAS-TV and Valley to work out the terms of payment?"

78. By letter of January 25, 1974 the BLM replied. Its letter stated, in pertinent part: ". . . the permit would be issued with the right of access to the site leaving to your client and KLAS-TV to work out details and terms of payment for joint use of the access road."

79. From the foregoing, it can be found that if the FCC issues Valley a construction permit for a transmitter site on Black Mountain the BLM will issue Valley a permit to use the transmitter site and the access road. However, there remains the question of whether, assuming Valley should receive the BLM permit, it could actually use the road without first coming to agreement with Alta. On that vital point the record is very much less than clear.

80. On January 31, 1974 Mr. Lewis Hillman, the staff legal assistant in the BLM's Division of Lands and Realty, was called to testify. He made it clear that it is the policy of the BLM to stay out of disputes between original and later permittees as to the terms for use of facilities constructed by the original permittee. In the event of dispute the BLM would not make the determination or even attempt to arbitrate. In the event the parties were unable to reach agreement the BLM would have to refer the matter to its

solicitors "for a determination whether we have the authority or would have to take it to the U.S. Attorney." The basis for any referral would be to determine "whether any action by KLAS violated the permit."

81. In short, the record does not permit a finding as to the probable result of a refusal by Alta for Valley to use the road if Valley should obtain a BLM permit but decline to pay Alta's price. It can only be found that BLM would not intervene in the dispute, but that it might take some unspecified action in the event it determined that under such circumstances Alta's refusal to let Valley use the road constituted a violation of the terms of Alta's permit. The record provides no reasonable basis for predicting whether Valley would actually be able to use the road pending resolution of the dispute, or whether Valley would ultimately be required to pay for the privilege of using the road which Alta built and, if so, how much. Presumably, the United States Courts have jurisdiction to resolve the matter, but the parties cite no statutes or precedents which might be controlling.

#### Issue 8: Valley's Financial Qualifications

82. This issue is conclusionary and requires no separate finding of fact.

#### Issue 9: Mr. Gold

83. Meyer "Mike" Gold is Vice President, Director, 12.5% shareholder and General Manager of Valley. He is 50% owner of the corporate licensee of KLOM and KLOM-FM in Lompoc, California. Mr. David Jacob owns the other 50% of KLOM and is its Resident General Manager.

84. In 1962 Gold acquired Station KLUC-AM in Las Vegas and shortly thereafter he put KLUC-FM on the air. In December 1969 he filed applications to assign those stations, the applications were granted in June, 1970 and the assignments were consummated September 1970.

85. In responding to the question in the application as to the assignor's reason for assigning, he responded:

"Assignor desires to concentrate his time on the operation of Station KLOM, Lompoc, California of which he is President and 50% owner and to develop a new syndicated program service."

This issue has been designated to determine whether that answer was candid.

86. Prior to the sale of his Las Vegas stations Gold had been relying on Jacob to run the Lompoc stations. He kept in touch through the financial reports which Jacob sent him and through periodic visits. He estimated that he averaged 12-15 days each year in Lompoc. Following the sale of his Las Vegas stations in September of 1970, he went to Lompoc for 2 or 3 days to determine just what contributions he could make.

87. During his stay in Lompoc he consulted with Jacob, some of the local advertisers and certain local citizens. He decided that Jacob was running the station just about the way he would himself and that his increased participation would contribute little. Accordingly, he resumed his prior pattern of leaving the active management of affairs to Jacob and, if anything, has devoted less time to the affairs of KLOM than he did before he sold the Las Vegas stations.

88. From October of 1970 through early 1971, Mr. Gold and his son devoted time to an unsuccessful attempt to sell a program format they had developed to radio stations in Salt Lake City and Los Angeles. He described their efforts as substantial, but was unable to estimate the actual amount of time devoted to the project.

89. Mr. Gold acknowledged that the substantial price he received for the sale of the Las Vegas stations was an important factor in his decision to sell. He had listed the stations with a broker early in 1969 at an asking price of

\$1,000,000. However, when he received an offer of \$750,000 he regarded it as so attractive he decided to accept. He believed that, since the transfer application contained all of the financial details of the transaction, it would be redundant for him to explain that price and profit were a factor in his decision.

#### Issue 10: Comparative

90. KORK-TV is licensed to Western Communications, Inc., a wholly-owned subsidiary of Donrey, Inc. Donald W. Reynolds is the President, a Director, and sole stockholder of Donrey, Inc. Through Donrey, Inc., or otherwise, Donald W. Reynolds owns, directly or indirectly, more than twenty-five companies that comprise the Donrey Media Group, which owns daily and weekly newspapers, cable television systems, radio stations, television stations, and outdoor advertising firms in eight states in the West and Midwest.

91. In the city of Las Vegas, Nevada, Reynolds owns, through Donrey Media, Inc., the *Review-Journal*, the largest of the two daily newspapers in the city. The *Review-Journal* is published weekday evenings and on Saturday and Sunday mornings, and had a 1973 circulation of approximately 62,000.

92. Also in Las Vegas, Reynolds owns through the Southwestern Broadcasting Company, a subsidiary of Donrey, Inc., KORK(AM) and KORK-FM. KORK(AM) is a 5 kw daytime and 500 w nighttime station; KORK-FM is a 44 kw FM station. Donrey Outdoor Advertising Company-Las Vegas, an unincorporated division of Donrey, Inc., also is based in Las Vegas. Finally, Donald W. Reynolds owns directly an 80% interest in the Las Vegas-based Southwestern Improvement & Investment Co., which, through one of its divisions, Nevada Cablevision Company, is the holder of a franchise for a CATV system in approximately one-half of Clark County, in which the city of Las Vegas is located.

93. Elsewhere in Nevada, Donald W. Reynolds owns, through Donrey, Inc., a daily newspaper in Carson City, Nevada, the *Nevada Appeal*, and a daily newspaper in Ely, Nevada, the *Daily Times*. The *Nevada Appeal* had a 1973 daily circulation of 5,500. The *Daily Times*' daily circulation in 1973 was approximately 3,500. Mr. Reynolds also owns two weekly newspapers in Nevada.

94. Through Nevada Radio-Television, Inc., another subsidiary of Donrey, Inc., Reynolds is the owner of Television Station KOLO-TV, Channel 8, in Reno, Nevada. Through another wholly-owned subsidiary, Western Broadcasting Company, Donrey, Inc., is the licensee of KOLO(AM) in Reno, a 5 kw daytime, 1 kw nighttime AM station. Reynolds also owns a television translator station in Reno, Nevada, and holds eight television translator station authorizations and twelve television translator relay station authorizations throughout the state of Nevada. In addition to these broadcast interests in Nevada, Reynolds owns, through Donrey, Inc., an outdoor advertising concern in Reno, Nevada.

95. Western Communications, Inc., the licensee of KORK-TV, is also the licensee of Television Station KGNS-TV, Channel 8, in Laredo, Texas. At the time this case was designated for hearing, Reynolds owned KFSA-TV, Inc., licensee of KFSA-TV, Channel 5, Fort Smith, Arkansas, the only VHF station assigned to Fort Smith. Also in Arkansas, Reynolds owns Northwest Arkansas Broadcasting & Television Company, licensee of radio Station KBRS(AM), Springdale, Arkansas, and Fort Smith Broadcasting Company, licensee of radio Station KFSA(AM), Fort Smith, Arkansas.

96. Reynolds also owns, through Donrey, Inc., or other wholly-owned subsidiaries, the following media interests:

## DAILY NEWSPAPERS

Name and Location	Approximate Circulation
Southwest Times Record, Fort Smith, Arkansas .....	40,000
Daily News, Rogers, Arkansas .....	7,500
The Springdale News, Springdale, Arkansas ..	9,600
Daily Report, Ontario, California .....	30,000
Progress-Bulletin, Pomona, California .....	46,000
Daily News, Red Bluff, California .....	7,400
Hawaii Tribune-Herald, Hilo, Hawaii .....	14,500
Times Herald, Washington, Indiana .....	10,500
Monitor-Index, Moberly, Missouri .....	9,000
Examiner-Enterprise, Bartlesville, Oklahoma ..	12,000
Journal-Tribune, Blackwell, Oklahoma .....	5,500
Daily Express, Chickasha, Oklahoma .....	6,000
Daily Leader, Frederick, Oklahoma .....	3,500
Daily Leader, Guthrie, Oklahoma .....	4,000
Daily Herald, Guymon, Oklahoma .....	4,000
Daily News, Holdenville, Oklahoma .....	3,500
Daily Times, Okmulgee, Oklahoma .....	6,000
Democrat, Pauls Valley, Oklahoma .....	5,000
Journal-Capital, Pawhuska, Oklahoma .....	4,000
Daily Times, Wewoka, Oklahoma .....	3,200
Daily Democrat, Weatherford, Texas .....	5,000
Sweetwater Reporter, Sweetwater, Texas ...	4,500
Daily World, Aberdeen, Washington .....	18,500

## WEEKLY NEWSPAPERS

Name and Location	Approximate Circulation
The San Dimas Press, San Dimas, California.	3,750
The Montclair Tribune, Montclair, California.	6,100
The Diamond Bar Bulletin, Diamond Bar, California .....	11,350
The Upland News, Upland, California .....	9,500
The Cucamonga Times, Cucamonga, California .....	5,725
The LaVerne Leader, LaVerne, California ...	3,275

(These six weekly newspapers are published by the Bonitia Publishing Company, Montclair, California.)

The Democrat, Booneville, Arkansas .....	2,684
The Times Echo, Eureka Springs, Arkansas	3,000
West Hawaii Today, Keaulakekua, Hawaii ..	4,600

Various other weekly publications are published in conjunction with the daily newspapers, such as the Carson City Chronicle, which is a free distribution weekly.

## Outdoor Advertising

Donrey—Fort Smith, Arkansas  
Donrey—Tulsa, Oklahoma

## CATV

Bartlesville, Video, Inc. (20% interest), holder of franchise for CATV systems under construction in Bartlesville and Dewey, Oklahoma.

Riverbend Industries, Inc. (33 $\frac{1}{3}$ % interest), owner and operator of CATV system in Stigler, Oklahoma.

97. Valley itself has no connection with any instrument of mass communications. The only connection of any of its principals is the 50% ownership in Stations KLOM-AM/FM, Lompoc, California by Meyer Gold, a Vice President, director, 12.5% stockholder and general manager of the corporation.

98. In the determination of which applicant is most likely to render the best practicable service the Commission does not consider the standard comparative criteria when dealing with a renewal applicant. With respect to such applicant the prediction as to future service is based entirely on past service, *A. H. Belo Corp.*, 40 FCC 2d 1131. Hence, these findings will consider only the past operation of KORK by Western and the standard comparative criteria for Valley.

#### KORK's Program Service during the Last License Period

99. During the license period KORK-TV expanded the size of its staff and the amount of its equipment to keep pace with the increased volume of local news programs broadcast. Local news increased from five hours per week at the beginning of the license period to eight and one-quarter hours per week by the end of the license period. Local "in-depth reports," "mini-documentaries," or "feature reports" were regularly included in local news programming. Local community leaders and spokesmen were regularly sought out for appearances in local news programs. Attention was devoted to matters of special interest to ethnic minorities, and members of minority groups were employed and used on the air. Efforts were made to cover political and governmental affairs, on the local and state levels in particular, using for this purpose such resources as its free-lance state capital correspondent who reported on KORK-TV over Western's Reno-Las Vegas private intercity microwave system. KORK-TV local news also presented comprehensive election campaign coverage and election result reporting. Weather, sports and busi-

ness news were regular features of local news programming. In addition to its local news programming effort, KORK-TV broadcast throughout the license period all news programs of the NBC Television Network, both regularly scheduled and specials, that were available to the station.

100. KORK-TV's regularly scheduled local news programs included two one-half hour daily (Monday through Friday) programs that were broadcast throughout the past license period, one at 6:00 p.m., and another at 11:00 p.m. Beginning September 15, 1969, and continuing for the balance of the license period KORK-TV also broadcast a regularly scheduled one-half hour local news program at 12:00 Noon, Monday through Friday. A weekly Saturday one-half hour local news broadcast at 6:00 p.m., was added to the local news schedule in August, 1971, and in September, 1971, a weekly Sunday 15-minute local news broadcast at 11:00 p.m. was begun; both continued for the rest of the license period. These news programs were of conventional format.

101. KORK-TV regularly included "in-depth reports," "mini-documentaries" of "feature reports" in its news coverage. These dealt mostly with human problems. Extra time for these reports was taken to do research and to film interviews with the people concerned. Reports of this nature were done on: special programs for underachieving readers in public schools; efforts of teenagers to counter drug abuse; activities of welfare mothers to deal with state and county welfare departments; the need for improved traffic control; abuse of the environment and its remedy; the need for more jobs and the preparation of the underemployed for better jobs, including minorities; and on other topics. Other news features, of a cultural or informative nature, were also produced by the KORK-TV staff. These included stories on the cultural programs of Black, Latin American, and Indian minority residents; musical and dramatic events; general educational topics, including

public library and university activities; and recreation and leisure activities. The preparation of these types of stories also used more film than the typical news story, and took extra time and effort on the part of the reporters.

102. A list of Las Vegas and Nevada community leaders and spokesmen who appeared on film in KORK-TV news programs during the nine-month period from January 1, 1971, through September 30, 1971, included 139 individuals who appeared in a total of 203 different news films. Included were government officials, such as city and county commissioners; the Mayor of Las Vegas; the Henderson City Manager; State Assemblymen and U.S. Senators; Congressmen and members of various state, county and city boards and commissions; various candidates for political office; educational officials; representatives of Black and Spanish-speaking minority groups; citizen spokesmen on issues such as busing; representatives of the poor; welfare officials; etc.

103. KORK-TV maintained contact on a regular basis between one or more of its news staff members and the local governmental entities and officials within its service area who were likely to take actions affecting the lives of citizens in a significant way. These regular sources of news included the Clark County Commission; the County Administrator; the heads of County Departments, such as Public Works, Parks and Recreation, Welfare, and the Sheriff's Office; the Las Vegas City Commission; the Mayor's Office; the City Manager; the City Departments, such as the Director of Public Works, Parks and Recreation, and the Traffic Engineer; the City of North Las Vegas Council; the North Las Vegas City Manager; City Attorney; Police Department; and so forth. Also, there were the state government administration and state agencies with divisional offices in Las Vegas, including the Governor's Office in Las Vegas, the Equal Rights Commission (with headquarters in Las Vegas), the State Division of Educa-

tion, the State Highway Patrol, and the State Division of Highways.

104. It was standard operating procedure in the KORK-TV News Department for any story of a possibly controversial nature to be checked with the original source, and with any source of an opposing view, before the story was aired. When a second side was unavailable, this was reported to the audience, unless the News Department was unable to identify an opposing position.

105. KORK-TV also covered the affairs of the Nevada State Government. Regular reports were prepared by a full-time free-lance political reporter in Carson City. His reports were transmitted by microwave from KOLO-TV to KORK-TV.

106. Coverage of the legislature by KORK-TV took place during its two to three month regular biennial sessions. Many of the Southern Nevada legislators came to Las Vegas on weekends during the session, and, when possible, KORK-TV interviewed them on state government topics in the news while they were in Las Vegas. In April, 1971, during the legislative session, KORK-TV's News Director spent a week at the Capital in order to get more complete and detailed reports on certain bills that would have special effects on Southern Nevada, and to assist Correspondent Shieler in improving the production quality of his reports. During this time at least five news interviews and reports on the legislative activities of the week were done, with special attention given to legislation on reapportionment, which was important to the Las Vegas audience.

107. KORK-TV also provided coverage of special events from the Capital, including the following programs:

*"The State Of The State Message"*—delivered by Governor Paul Laxalt on January 18, 1970, from 6:30-7:30 p.m. (prime time), and broadcast live by KORK-TV, direct from Carson City.

*"The Inauguration Of Governor Mike O'Callaghan"*—the inaugural ceremonies were broadcast live by KORK-TV from Carson City on January 4, 1971, from 11:00 a.m. to 12:00 Noon, with a repeat broadcast by KORK-TV on the same night from 10:00-11:00 p.m. (prime time), in order to bring this event to as many Nevadans as possible.

*"The Opening Of The State Legislature"*—broadcast by KORK-TV live from Carson City on January 18, 1971, from 12:00 Noon to 3:00 p.m.

*"The State Of The State Message"*—delivered by Governor Mike O'Callaghan and broadcast live by KORK-TV from Carson City on January 20, 1971, from 7:30 to 9:00 p.m. (prime time).

108. KORK-TV provided coverage of the activities of federal government agencies located in the Las Vegas area. These included the Atomic Energy Commission (Nevada Test Site), Federal Grand Juries, and NERVA (Nuclear Rocket Development). Efforts were also made to broadcast interviews on timely subjects with political and government figures of national stature, including Nevada's Senators and Representatives, when they were in Las Vegas.

109. KORK-TV also used the services of the Donrey staff correspondent in Washington, D.C., during the past license period. KORK-TV broadcast filmed reports from this source on approximately a monthly basis and audio-taped reports on a less frequent basis. The filmed reports were usually interviews with Nevada's congressional representatives, accompanied by explanatory opening and closing statements by the correspondent.

110. KORK-TV also broadcast a series of programs entitled *"Ask Congress."* This recorded program was produced in Washington, D.C., and in it, letters from viewers across the United States were answered by members of

Congress. The 13 one-half hour programs in this series were broadcast on Sundays from 2:00-2:30 p.m., during the period March through June, 1971.

111. During election campaigns, KORK-TV undertook to use its facilities both to give each candidate exposure to the viewers and to give the viewers adequate knowledge of each candidate. KORK-TV's policy was to use as many as possible of the statements released by candidates, and particularly those that provided hard or new information on his position or views.

112. KORK-TV's election night programming throughout the license period included total or partial simulcasts with KOLO-TV in Reno. For the Nevada Primary Election returns on September 1, 1970, KORK-TV preempted NBC network programs from 7:30 p.m. through Midnight, to provide four and one-half hours of state-wide election returns and analysis. During general elections in November, 1968 and 1970, local broadcasts were interspersed with NBC network election programming. On November 5, 1968, for example, utilizing local "cutaway" times provided by NBC, KORK-TV provided a total of 1 hour and 15 minutes of Nevada election coverage between the hours of 4:25 p.m. and 1:30 a.m. the following morning.

113. In mid-September, 1971, KORK-TV hired a professional meteorologist on a part-time basis as its weatherman. He delivered "mini-lectures" to the audience on the natural phenomena which cause the weather, and explained why we get the kind of weather we do at certain times, as well as giving reports on current conditions and the forecast.

114. KORK's Sports Director covered local amateur events including organized university and high school athletics, as well as more individualized activities, such as archery, swimming, gymnastics, skiing, ice skating, marathon running, bicycling, junior bowling and horsemanship. The sports format included filmed reports on athletic con-

tests and filmed interviews with players and coaches. The practice was also to cover sports events sponsored by schools, scouts, youth clubs, adult clubs, and local parks and recreation departments, such as high school sports of all kinds, Little Britches Rodeos, Dog Shows, Little League Baseball, Pop Warner Football, Golden Gloves Boxing, and sports for the handicapped. KORK-TV sports also gave regular attention to hunting, fishing, and other outdoor activities, and as a part of this coverage information on environmental subjects and conservation was broadcast, as well as reports intended to keep viewers informed on outdoor recreation areas that are available for their use, particularly in Nevada.

115. The station supplemented network coverage of general stock market results with reports from a local brokerage firm.

116. A number of local documentary programs were produced by the KORK-TV News Department during the license period. Although the major effort of the KORK-TV News Department was devoted to the station's regular newscasts, certain subjects were dealt with in a longer, documentary format because of their complexity and their significance to the community. Usually these local documentaries were broadcast in prime time. Individual locally produced documentary programs during the license period included:

*"The Black Vote"* (November 1, 1968, 6:30-7:00 a.m., and November 3, 1968, 1:07-1:35 a.m.)—Exploration of the thoughts and reactions of the Black community to current issues facing voters at election time; discussion of the effect the votes cast by Black Nevadans might have on the outcome of the elections; and interviews with Black residents and leaders of the Las Vegas area and with public officials.

*"Does The Dream Come In Black?"* (June 30, 1970, 8:00-8:30 p.m.)—Interviews of local Black citizens in various jobs and students to discover whether they were encouraged by the American dream of opportunity; comment on their view of opportunity and what success they had achieved in their own lives; interviews with employers as to their policies for, and accomplishments in, hiring minorities; co-authored and co-produced by KORK-TV Black Newsman Toston.

*"Prison Of Our Own Making"* (September 7, 1970, 10:30-11:30 p.m.)—A program to give the public an idea of the treatment received by prison inmates and to explore the subject of race relations in the prison; interviews with former inmates of the Nevada State Prison, both Blacks and whites, and with state officials; co-authored and co-produced by KORK-TV Black Newsman Toston.

*"Will We Pollute Nevada?"* (December 9, 1970, 8:30-9:00 p.m.)—Exploration of pollution of air, water and land in the Southern Nevada area, with extensive use of interviews with local experts in the environmental field who discussed the problems and the solutions offered by local agencies.

*"Medical Care—The Eleventh Right"* (August 31, 1971, 7:30-8:00 p.m.)—Examination of the health and hospital services available to residents of the area and discussion of their strengths and weaknesses with local doctors and other authorities.

117. During the latter part of the past license period, KORK-TV began to present a regular monthly one-half hour prime time program designed to deal with one to three subjects of local interest. The two programs in the

series that were broadcast during the past license period were:

*"Nevada—August '71"* (August 16, 1971, 10:30-11:00 p.m.)—An in-depth study of an old Indian woman who lived in Las Vegas, her recollections of her childhood life in Las Vegas nearly one-half century before, and demonstration of some Indian arts. Also on the program was a report on gaming as conducted in Nevada compared with gaming as proposed by New Jersey.

*"Nevada—September '71"* (September 28, 1971, 10:30-11:00 p.m.)—A light look at the passing of the convertible automobile from the American Scene, plus an in-depth report entitled "Where Does The Water Come From," dealing with the Vegas Valley Water District and the Southern Nevada Water situation.

118. KORK-TV broadcast station editorials during the past license period. Prior to January, 1971, editorials were broadcast irregularly and approximately only two to three times a year. The frequency of the station's editorials was thereafter increased, and beginning in February, 1971, editorials were broadcast on the average of about two each month. In July, 1971, shortly after a new general manager took over, editorials were undertaken on a weekly basis. From July through September, 1971, the station's weekly editorials were generally broadcast three times each week—at the close of the 6:00 p.m. and 11:00 p.m. local news programs on Tuesdays, and at the close of the local noon news program on Wednesdays.

119. Invitations for reply editorials were included as an integral part of the introduction of each editorial, and reply time was provided to responsible spokesmen with contrasting viewpoints in connection with an editorial on teacher-school district negotiations. Copies of editorials were mailed to persons or groups that would be likely to have a view-

point, whether in favor or in opposition, on the matter discussed.

120. KORK-TV broadcast locally produced programs during the license period to provide an outlet for the expression of the views of local persons, groups and community leaders concerning a variety of topics. One of these was *"Think!"* This weekly one-half hour public affairs program was broadcast twice each week throughout the past license period (Mondays at 6:30 a.m. and Wednesdays at approximately 2:30 a.m.) and, beginning June 13, 1971, it was broadcast a third time each week on Saturday or Sunday afternoon. Dr. Heinz Rettig was moderator of this program which had begun in 1964. The subject matter included topics such as welfare, education, religion, local government, social agencies, charitable organizations, and local industrial and economic problems and plans. Guests have included community leaders from Las Vegas, Southern Nevada, and the entire state of Nevada, as well as nonlocal individuals and groups of all types who had views on subjects of importance to express. A number of participants have been minority group members.

121. Another interview and discussion type program on which show business personalities, educational and cultural leaders, members of the general public, representatives of local charitable, minority and professional organizations, and various other community leaders appeared was *"The Red McIlwaine Show,"* a one-half hour local interview program broadcast each weekday afternoon at 2:30 for 13 weeks in the spring of 1969. Each program included four to five guests with differing interests. Each guest was interviewed separately, with a general discussion involving all guests following the introductory interviews.

122. KORK-TV provided local public service programs that involved local charitable and service organizations during the license period, as follows:

*"United Fund"* (October 19, 1968, 2:00-2:15 p.m.)—Local United Fund officials appeared to explain the purpose and goals of the United Fund campaign to raise funds for charitable purposes.

*"Muscular Dystrophy Telethon"* (September 6-7, 1970, 20 hours: 7:30-3:30 p.m.)—KORK-TV broadcast the entire telethon and also was the originating station for a coast-to-coast network for a two hour segment (1:00-3:00 a.m.) of this twenty hour program.

*"Easter Seal Telethon"* (April 3-4, 1971, 17 hours: 11:00 p.m.-4:00 p.m.)—This program was the first Easter Seal Telethon in the United States, and the beginning of the nation-wide Easter Seal Telethon. The program was a simulcast with KOLO-TV in Reno and was produced for the Nevada Chapters of the Easter Seal Society.

*"The Boy Scout Fun Fair Simulcast"* (April 23, 1971, 4:30-5:00 p.m.)—This program was produced by KORK-TV for simultaneous broadcast by all Las Vegas television stations in cooperation with the Boulder Dam Council of the Boy Scouts. It featured Scouts and Scout leaders explaining the different scouting programs and served as an incentive to join the Boy Scouts.

123. KORK-TV broadcast public service announcements for a wide variety of local, area and national organizations and governmental agencies during the past license period. Many of KORK-TV's public service announcements were actually physically produced without charge by the station for local organizations. The station broadcast over 14,850 public service announcements during the 28 months during the past license period for which KORK-TV program logs were available, or an average of about 125 each week, exclusive of network public service announcements.

124. KORK-TV regularly broadcast at least 2½ hours of religious programming each week, more than any other television station in Las Vegas. In addition, KORK-TV broadcast special, prime time religious programs. KORK-TV's regularly scheduled religious programs during the past license period included:

*"Faith For Today,"* a one-half hour recorded program, was broadcast on all but eight Sunday mornings during the past license period. It was produced by The Family Religious Telecast in Long Island, New York, under the direction of Dr. W. A. Fagal, and consisted of dramatized situations, narrated documentary films, and interviews conducted by Dr. Fagal. The general theme was interdenominational, focusing on general Christian values and solutions to problems.

*"Insight,"* a one-half hour recorded program, was broadcast on all but ten Sunday mornings during the past license period. It was produced by The Paulist Fathers in Pacific Palisades, California, and consisted of dramatic productions with professional actors, with a religious or moral message.

*"Rex Humbard,"* a one hour recorded program, was broadcast on all but two Sunday mornings during the past license period. It was a religious service, evangelistic and interdenominational in nature, with sermons delivered by the Rev. Rex Humbard.

*"The Answer,"* a one-half hour recorded program, was broadcast on Sunday mornings from February through September, 1969. It was produced by the Radio and TV Commission of the Southern Baptist Convention, Fort Worth, Texas, and consisted of discussions and dramatic presentations.

*"Oral Roberts,"* a one-half hour recorded program, was broadcast on Sunday mornings from April, 1969,

through the balance of the past license period. It consisted of religious services from the Tulsa, Oklahoma, campus of the Oral Roberts University, with sermons by Rev. Roberts, students participation, and guest appearances.

"*NBC Religious Series*," one-half hour network programs, were broadcast on Sunday mornings from the beginning of the past license period through January 4, 1970. They were produced by the Religious Unit of NBC News, and encompassed various religious faiths.

125. KORK-TV's special religious programs during the past license period included:

"*NBC Religious Specials*"—After January, 1970, KORK-TV broadcast NBC religious programs as irregularly scheduled specials. KORK-TV broadcast 23 of these NBC religious specials on Sundays, beginning in March, 1970, through September, 1971. There were 23 of these programs (4 one-half hour programs, 18 one hour programs, and 1 one and one-half hour program), 14 of which were broadcast in the afternoon.

"*Billy Graham Crusades*" (September 8, 9, and 10, 1970, 7:30 p.m.; May 24, 25, 26, 1971, 8:00 p.m.)—One hour recorded programs that provided coverage of evangelical religious events held before large groups of people in major cities throughout the United States.

"*Oral Roberts Specials*" (March 28, 1970, 6:00-7:00 p.m.; June 21, 1970, 7:30-8:30 p.m.; September 9, 1970, 10:00-11:00 p.m.; November 25, 1970, 10:00-11:00 p.m.; April 4, 1971, 4:30-5:00 p.m.)—One-half hour and one hour recorded programs of Oral Roberts, at the Oral Roberts University in Tulsa, Oklahoma, with student participation.

126. Additional religious programming was provided by KORK-TV during the Christmas and Easter seasons. During the week before Christmas in 1968 and 1969, KORK-TV presented a series of five recorded one-half hour programs "The Word Was Yes," "Sound of Praise," "Prime Time," "Final Encounter," and "Unlikeliest Place"), which were broadcast from 6:30-7:00 a.m., and which presented a dramatized story of the events leading to the birth of Jesus Christ. Another example of a timely special religious series broadcast by KORK-TV was the "Prince of Peace" series, which was a dramatized story of the activities of Christ leading to His crucifixion and rising from the dead. This series of five one-half hour recorded programs was broadcast in the week before Easter at 6:30 a.m. in 1969, 1970, and 1971. Among the other special religious programs broadcast by KORK-TV was a one hour Midnight Mass from St. Patrick's Cathedral in New York City provided by NBC and broadcast by KORK-TV at Midnight every Christmas Eve and a one-half hour locally produced "Christmas Special" featuring a local choir, broadcast on Christmas, 1970.

127. KORK-TV broadcast two series of educational programs in cooperation with the University of Nevada at Las Vegas (formerly Southern Nevada University) during the license period. The first of these was a course on accounting for credit) consisting of a series of recorded one hour lecture programs broadcast by KORK-TV once a week at 6:00 a.m., from August 28, 1968, through November 27, 1968. Another series of lectures (non-credit) entitled "Operation Economy" was presented as a series of 13 one-half hour recorded programs, and broadcast 6:30 a.m. from March 28, 1969, through June 20, 1969.

128. KORK-TV broadcast the following instructional type programs and program series during the past license period:

*"The Wild Kingdom" Sundays*, (4:30 p.m. (1/12/69-6/8/69) and 7:00 p.m. (9/14/69-6/28/70, 9/13/70-4/11/71, and 9/12/71-9/25/71))—This one-half hour program, which studied wild animals in their natural habitat, was an NBC network program until April, 1971, and beginning in September, 1971, it was a recorded program purchased by KORK-TV.

*"Land Of The Sea"*—A one hour documentary about the sea and the life in it broadcast November 29, 1970, at 7:30 p.m.

*"The Seven Seas"*—This program was an award winning series of seven documentaries about the life within and around our seven seas, which was broadcast in prime time once each month, from January through June, 1971.

*"Africa"*—A one hour special program which was a descriptive documentary about the people, the land, and the environment of the Continent of Africa, was broadcast in prime time on September 12, 1971.

*"NASA Reports"*—KORK-TV programmed at various times more than 30 special reports from the National Aeronautics and Space Administration, which provided information on the activities and plans of this important agency.

129. KORK-TV also broadcast recorded informational type programming throughout the license period during the 6:00-7:00 a.m. time period on weekdays. Among these programs were the following:

*"Army And Navy Films"*—These productions by the United States Army and the United States Navy

were on issues of significance, not just to those interested in military life, but to the general public as well.

*"Civil Defense Films"*—A series of approximately 35 programs presented in cooperation with the Clark County Civil Defense Agency. The subject of local preparedness, not just for a national emergency, but for large-scale emergencies of local nature.

*"Other Films"*—Also broadcast during this time period were films obtained from sources such as Modern TV Films, Sterling Films, several state governments, and various organizations of national scope. Subjects included manufacturing processes, agriculture, mining and natural resources, the geography, people and history of distant lands, as well as of other parts of the United States, and information on "how to do" things, such as crafts, arts, or around-the-home chores.

*"The Turned On Crisis"*—KORK-TV also broadcast this series of eight one hour programs on drug abuse that was produced by the National Educational Television. These were broadcast from February 4, 1971, through March 2, 1971.

130. KORK-TV programmed *"Across The Fence,"* produced by the United States Department of Agriculture, on Tuesday mornings from 6:00-6:30 a.m. throughout the past license period.

131. KORK-TV was an affiliate of the NBC Television Network throughout the license period. In the aggregate, network news, cultural and informational programs offered by NBC to its affiliates totaled more than 1,000 hours during 1970, and accounted for approximately 21% of all NBC programs. KORK-TV carried most NBC network programs offered to it.

132. KORK-TV's performance during the composite week specified by the Commission for stations with licenses that expired in 1971, and as set forth in the KORK-TV license renewal application, was as follows:

Total Hours of Operation (Time on Air): 149

Time, exclusive of commercial matter, devoted to:	Hours	Minutes	% of Time on Air
News: .....	13	0	8.7%
Public Affairs: .....	4	49	3.2%
All Other Programs, exclusive of Entertainment and Sports: .....	7	37	5.1%
Totals of Above ....	25	26	17.0%

Local Program Time: ...	11	55	8.0%
Local Prime Time Programs (6:00-11:00 p.m.): ....	2	30	7.1%

Public Service Announcements—Total Number .....	239
Local Number .....	171
Network Number .....	68

133. During the composite week KORK-TV broadcast at least some news every day, and at least some public affairs and "other" programming every day except Saturday. Of KORK-TV's total news time during the composite week, more than 41% was locally originated news. Although KORK-TV did not broadcast locally originated news on Saturday or Sunday of the composite week, only one of the

other two network affiliates in Las Vegas broadcast locally originated news on Saturday or Sunday.

134. Looking more broadly than just at the composite week, analysis of KORK-TV's performance during each of 111 weeks of the license period for which program logs were available, shows that the average amount of public affairs programs broadcast by KORK-TV was 4 hours 14 minutes per week, the average amount of news was 12 hours 27 minutes per week, and the average amount of "other" programs was 9 hours 57 minutes per week. In none of the weeks analyzed did KORK-TV present less than 2 hours 8 minutes of public affairs, or less than 9 hours 6 minutes of news, or less than 6 hours 45 minutes of "other," whereas in the highest week for each category there were 7 hours 56 minutes of public affairs, 28 hours 15 minutes of news, and 30 hours 46 minutes of "other."

135. The record includes a statistical comparison of KORK-TV's past performance data from its 1971 license renewal application with the same data from (a) the 1971 license renewal applications of the three other Las Vegas stations (two network affiliates and one non-affiliate), and (b) the most recent license renewal applications of the network affiliated stations in eight other markets of comparable size with Las Vegas.<sup>12</sup>

<sup>12</sup> The markets of comparable size to the Las Vegas market were all those markets reported by the American Research Bureau (ARB) in its "1971 Television Market Analysis" as having a number of prime time households within plus or minus ten percent of the number of prime time households in the Las Vegas market. In 1971, Las Vegas had 61,000 prime time households and was the 130th television market in number of prime time households. The television stations in Las Vegas were KORK-TV (NBC), KLAS-TV (CBS), KSHO-TV (ABC), and KVVU (Ind.). The eight other television markets (between 54,900 and 67,100 prime time households) were Quincy-Hannibal (including Jacksonville, Ill.), Odessa-Midland, West Palm Beach (including Ft. Pierce-Vero Beach), Savannah, Wilmington, N.C., Minot-Bismarek, Columbia-Jefferson City, and Traverse City-Cadillac.

136. *Hours of Operation*—KORK-TV was second among all Las Vegas stations and second among all 22 stations in total hours of operation during the composite week. KORK-TV operated more than 25 hours longer than the average number of hours per week operated by the 20 affiliated stations other than KORK-TV. KORK-TV operated more than 26-1/2 hours longer than the average number of hours per week operated by eight NBC affiliates other than KORK-TV.

137. *News*—KORK-TV was second among all Las Vegas stations and ninth among all 22 stations in total hours of news programming. KORK-TV broadcast nearly 2 hours more news per week than the average amount broadcast by the 20 affiliated stations other than KORK-TV, and nearly 1 hour more news per week than the average amount broadcast by the eight other NBC affiliates.

138. *Public Affairs*—KORK-TV ranked third among all Las Vegas stations but stood a close fifth among all 22 stations in the total amount of public affairs programming. KORK-TV was one minute per week below the average for the other two Las Vegas affiliates and about 1/2 hour below the average for the other three Las Vegas stations. However, KORK-TV was more than 1 hour above the average for the eight other NBC affiliates and nearly 1-1/2 hours above the average for the 20 affiliated stations other than KORK-TV.

139. *News and Public Affairs Combined*—The amount of news and public affairs programming is reported separately on FCC Form 303 but may be combined to compare the overall performance of individual stations some of which may tend to emphasize news to a greater extent than public affairs, or vice versa. On this basis, KORK-TV stood first among all Las Vegas stations and third among all 22 stations analyzed. KORK-TV was nearly 3-1/2 hours above the average of the other 20 affiliates, nearly 2 hours above the average of the other eight NBC affiliates, nearly

3 1/2 hours above the average of the other three Las Vegas stations and more than 1/2 hour above the average of the other two Las Vegas affiliates.

140. *"Other" Programs*—Although KORK-TV stood second among Las Vegas stations and fourth among nine NBC affiliates in "other" programming hours, it provided slightly less than the average amount of this type of programming compared with the other 20 affiliates, the eight NBC affiliates and the two other Las Vegas affiliates.

141. *News, Public Affairs and "Other" Programs*—By combining news, public affairs and other programming, the total non-entertainment, non-sports effort of stations can be compared. On this basis KORK-TV stood second among all Las Vegas stations, fourth among the nine NBC affiliates analyzed and eighth among all 22 stations analyzed. KORK-TV provided nearly 2-1/2 hours more per week of this programming than the average of the other 20 affiliates analyzed, and 1-1/4 hours per week more than the average of the other eight NBC affiliates.

142. *Program Percentages*—The record also contains data for the foregoing types of programming based on percentages of total time on the air. However, there were wide variations in total hours broadcast by the various stations, with weekly totals ranging from 112 hours to over 161 hours. Hence, percentage comparisons are found to be of relatively little value in comparing the amount of non-entertainment programming actually presented by the stations involved.

143. *Local Programs*—The amount of local programming broadcast by KORK-TV was nine minutes less than the average of the 20 other affiliated stations, 43 minutes less than the average of all NBC affiliates, and 5 hours and 23 minutes less than the average of all NBC affiliates, and 5 hours and 23 minutes less than the average of the other two Las Vegas affiliated stations.

144. *Public Service Announcements*—KORK-TV was above average in the number of public service announcements broadcast. It stood first among Las Vegas stations, second among NBC affiliates and fourth among all 22 stations analyzed. KORK-TV broadcast 38 more PSA's per week than the average of the other two Las Vegas affiliates, 55 more than the average for the other three Las Vegas stations, 58 more than the average of the other NBC affiliates, and 69 more than the average for the other 20 network affiliates.

145. KORK-TV's news programs attracted large audiences. The early evening KORK-TV local newscast (6:00 p.m.) had the largest ARB audience rating figure of any Las Vegas locally produced newscast shown in any of the eight regular ARB Reports during the past license period. The size of the KORK-TV early evening news audience was, on the average, 50% greater than that of the next most popular local news program in the early evening period. KORK-TV's early evening news program consistently had a rating large enough to place it high among the top ten non-network entertainment programs in the market and was the only locally produced program to do so.

146. The late evening KORK-TV local newscast (11:00 p.m.) had the highest ARB audience rating figure of any late evening local newscast throughout the past license period. The size of KORK-TV's audience for its local state evening news was, on the average, 61% larger than the audience for the local late evening newscast on the Las Vegas station with the next highest audience figures.

147. KORK-TV's daily local noon news program began September 15, 1969, as the only local news program at noon. It was devoted entirely to local and regional news, "public affairs" type interviews and weather, sports and market reports. Although the program was broadcast at a time period when other stations were carrying entertainment programs, including one or two network entertainment

programs, it was consistently the program at that time of the day with the largest audience of any station in Las Vegas.

148. Further ARB survey data compiled in ordinary and regular course compares KORK-TV's performance with the other network affiliates in Las Vegas, with 12 other NBC affiliates in 13 markets including Las Vegas, and with 38 other network affiliates in 13 markets including Las Vegas.<sup>13</sup> On the basis of this analysis, KORK-TV compared as follows:

—For the afternoon day-part (Monday through Friday, 12:00 Noon to 5:00 p.m., Pacific Time and 12:00 Noon to 4:00 p.m., Mountain Time), KORK-TV had 51.2% of the

<sup>13</sup> The ARB Reports and survey periods were as follows: ARB November 1968 Report (November 6-26), ARB February/March 1969 Report (February 12-March 11), ARB November 1969 Report (October 29-November 25), ARB February/March 1970 Report (February 11-March 10), ARB November 1970 Report (November 1970 Report (November 4-24), and ARB February/March 1971 Report (February 10-March 9). The Las Vegas television market includes three VHF network affiliated stations and one VHF independent station. For purposes of audience measurement comparison, the other markets selected were all those located in either the Pacific or Mountain Time Zone, and having either three UHF or three VHF network affiliated stations and either no independent stations or one independent station. The audience obtained for various day-parts and for local early evening news and local late evening news by the network affiliates in the 13 markets were compared. To make this comparison, the "ratings" (percent of all television households in a market) obtained by each network affiliate in each of the six rating periods for a particular program or day-part were added, to give each network affiliate a gross point figure for that day-part or program. This gross rating point figure for a station reflected the total audience obtained by the station for all rating periods combined. The percent of the gross rating points in a market obtained by each affiliate in that market was computed, and these percentages of gross rating points obtained by each station in its market were compared.

gross rating points in the Las Vegas market, placing it first in Las Vegas, first among all 13 NBC affiliates and first among all 39 network affiliates. KORK-TV was 5.5 percentage points ahead of the next best station, the CBS affiliate in El Paso, which had 45.7% of the gross rating points in El Paso for the afternoon day-part.

—For the early evening day-part (Monday through Friday, 5:00 to 7:30 p.m., Pacific Time and 4:00 to 6:30 p.m., Mountain Time), KORK-TV had 48.6% of the gross rating points in the Las Vegas market, placing it first in Las Vegas, second among 13 NBC network affiliates, and third among all 39 network affiliates.

—For the entire week day-part (Monday through Sunday, 9:00 a.m. to midnight), KORK-TV had 48.5% of the Las Vegas gross rating points, placing it first in Las Vegas, first among 13 NBC network affiliates, and first among all 39 network affiliates. Only two other affiliates obtained as high as 40%.

—For the early evening local news program, KORK-TV obtained 49.5% of the gross rating points in the Las Vegas market, placing it first in Las Vegas, sixth among 13 NBC affiliates, and eighth among all 39 affiliates.

—For the local late evening news program, KORK-TV had 50.0% of the gross rating points in the Las Vegas market, placing it first in Las Vegas, third among the 13 NBC affiliates, and third among all 39 network affiliates.

149. The ARB data also shows that of the top 75 programs in the Las Vegas market ranked by Metro rating during the February/March, 1971, period, KORK-TV broadcast 8 of the top 10, 17 of the top 20, 24 of the top 30, 29 of the top 40, 32 of the top 50, 38 of the top 60 and 44 of the top 75 programs.

150. Apart from the matter of overloading network breaks, there is no evidence in the record of any kind as to

a single expression of viewer or public dissatisfaction or complaint with any aspect of KORK-TV's broadcast operations during the license period. On the other side of the coin, more than 100 community leaders offered favorable testimony with respect to specific aspects of KORK-TV's past performance during the license period. This testimony was in written form and was obtained by KORK-TV during the period December 15, 1972, through March 5, 1973.

151. Valley proposes to integrate four of its stockholders into its operation: James E. Rogers (12.5%); Meyer Gold (12.5%); Clark Henry Tester (2.5%); and W. Irving Haut (12.5%).

152. James E. Rogers, President, and Director of Valley, will devote an estimated 10 hours per week to the affairs of the station. As chief executive of the licensee, Mr. Rogers will work with the station's general manager, and with Valley's Board of Directors. In addition to participating in all policy decisions affecting the station, Mr. Rogers will oversee the day-to-day operations of the station, giving emphasis to the station's fiscal, editorial, and programming policies. Mr. Rogers will also maintain a liaison with the community leaders in Las Vegas and play an active role in the station's community relations program. Mr. Rogers is a lawyer and has resided in Las Vegas since 1953.

153. Mr. Rogers was a 7.5% stockholder and director of Desert Broadcasting Company, Inc., an applicant for Channel 13 in Las Vegas, Nevada, in 1967. The application was withdrawn. By virtue of his interest in Desert Broadcasting Company, Inc., Mr. Rogers became a party to a five-applicant interim operation of Channel 13, by Channel 13 of Las Vegas, Inc. His interest in Desert Broadcasting Company, Inc., resulted in an indirect interest of approximately 1.5% of Channel 13 of Las Vegas, Inc.

154. Mr. Rogers has participated in Rotary, the March of Dimes, and is legal counsel to the Boys Club of Clark County, Nevada.

155. Meyer Gold, a Vice President and Director, will be employed full-time as General Manager. He will be responsible to the Board of Directors for all phases of station operation, including programming, public relations, news, sales, employment, engineering, and network affiliation. Gold will personally supervise the station's commercial practices and policies, and will work with the station's Washington legal counsel concerning the interpretation and application of the Commission's rules. Mr. Gold has been a resident of Las Vegas for the past eleven years.

156. Mr. Gold's business career commenced with his work at Station WDGY in Minneapolis. Thereafter, for several years he was engaged in advertising and the production of television programs.

157. From 1962 until September, 1970, Mr. Gold was the sole proprietor of KLUC-AM and FM, Las Vegas, Nevada. He presently holds a 50-percent interest in Communications Corporation of America, licensee of KLOM-AM and FM, Lompoc, California, and was a 51-percent stockholder in Clark County Communications, Inc., applicant for Channel 13 in Las Vegas, Nevada, which application was withdrawn. By virtue of his stock interest in Clark County Communications, Inc., Mr. Gold became party to a five-applicant interim operation of Channel 13 by Channel 13 of Las Vegas, Inc., for approximately two years, from 1967 to 1969. Mr. Gold's interest in Clark County Communications, Inc., gave him approximately a 10-percent indirect interest in Channel 13 of Las Vegas, Inc. He was also a director of the interim operation. Mr. Gold was also a 66-2/3 percent stockholder in Boulder City Television, Inc., an applicant for Channel 5 in Boulder City, Nevada, which application was denied by the Commission after a comparative hearing.

158. Since moving to Las Vegas, Mr. Gold has been active in civic and community affairs. He has been secretary and treasurer of the Nevada State Broadcasters Association,

President of the Southern Nevada Broadcasters Association, a member of the Board of Directors of the Las Vegas Advertising Club, a member of the Board of Directors of the Executive Lions Club of Las Vegas, and a member of the Las Vegas Shrine Club. He has been a member of the Las Vegas Variety Club, the Las Vegas Elks Club, the Las Vegas Saints and Sinners, the Las Vegas Chamber of Commerce and the Governor's Committee on Defense Communications.

159. In his capacity as full-time General Manager of the station, Mr. Gold will determine the day-to-day programming and participate in all phases of the station's operation.

160. Clark Henry Tester, a Vice President and Director, will be employed full-time as director of news and public affairs programming for the station. Mr. Tester will be responsible to the station's general manager for the production and presentation of the news, public affairs programs, editorials, and other locally-originated programming. He has resided in the Las Vegas area since 1966.

161. Mr. Tester worked his way through college as a radio announcer. Thereafter, he was a teacher and also held part-time positions with KBMI radio, Henderson, Nevada, and KLVX-TV, Channel 10, Las Vegas, Nevada. In September of 1969, he was assigned to the school district television station, KLVX-TV, Channel 10, in the capacity of curriculum consultant. His primary assignment was to produce five-minute Social Science programs geared to the elementary grade level. Additional duties included staff announcing, hosting public affairs and public information presentations, and historical consultant to the station's Negro history project. In 1971 Mr. Tester produced, wrote, and served as on-camera talent for the first state-wide coverage of the Nevada Legislature. The first six months of 1972 saw Mr. Tester producing, writing, and serving as on-camera talent for a six-part documentary series concerning

issues of local and state-wide interest. In July of 1972, he was named to the position of Producer/Director for KLVX-TV, Channel 10. Shortly thereafter he was designated Producer/Public Affairs for public broadcasting at Channel 10, a position which he presently holds.

162. Mr. Tester is a member of the National Association of Educational Broadcasters, the Western Educational Society for Tele-communications, the Nevada Historical Society, the Southern Nevada Historical Society, the Arizona Pioneers Historical Society, and the Las Vegas Press Club. He is also a member of the Nevada State Employees Association and serves on that organization's Classified Employees Review Board. Mr. Tester is a member of the Environmental Protection Hearing Board for the State of Nevada. In addition, Mr. Tester served as the Nevada federal-state coordinator in conjunction with the United States Department of Interior, for the Southwest Energy Study which was completed in late 1972.

163. W. Irving Haut, Treasurer and Director of Valley, will devote an estimated 5 to 6 hours per week to supervision of the financial affairs of the station. As treasurer, Mr. Haut will work closely with the station's accounting department concerning all aspects of the station's financial affairs, including preparation of the budget, monitoring expenses, and reviewing the station's financial records.

#### *Conclusions*

##### *Issue 1(a): Fraudulent Billing*

164. From the start of the last license period through July of 1971, KORK, as a matter of policy and practice, regularly deleted portions of the network programming it had contracted to broadcast in order that it might accommodate extra local commercials. The station has advanced the claim that its policy was only to delete what it has described as network "clutter" and that it did not intend to delete network commercials. That claim is rejected as in-

credible. Given the not entirely predictable intermixture of network program material, "clutter," and commercials, the insertion of extra local commercials of predetermined length could not have failed from time to time to result in the covering of network commercial material. This fact could not have been less than apparent to the experienced broadcasters responsible for the operation of KORK. It is concluded that KORK deliberately and knowingly undertook a policy which inevitably resulted in the clipping of network commercials.

165. Nevertheless, KORK consistently reported to the network over the affidavits of its General Managers that all scheduled network commercials had been carried. The record does not establish that in any instance where a network commercial has been proven to have been clipped the General Manager had actual knowledge of that fact when he certified to the network that it had been carried. However, the record also fails to establish that the General Managers made any affirmative effort to ascertain the accuracy of the reports which they certified. In view of the fact that they knew their station was following a policy which must inevitably have resulted in the clipping of network commercials, their failure to check the accuracy of the reports they submitted to the network renders them constructively knowledgeable of those reports which were inaccurate.

166. The ultimate ownership of KORK vests in Mr. Donald W. Reynolds, Sr. The record indicates that he delegated all of the authority for the day-to-day operation of the station to subordinates. His chief subordinate was his son, Donald W. Reynolds, Jr. The record does not show that either of the Messrs. Reynolds had any contemporary knowledge of any of the specific acts of clipping which had been proven.

167. However, the record does show that Mr. Reynolds, Jr. had responsibility for and tacit knowledge of KORK's

practice of clipping. He instructed the General Manager that sales and income projections for the station must be increased. In a situation where network breaks were already full or overloaded, such instructions by an experienced broadcaster were tantamount to order to clip. Thereafter, he had general knowledge that the station was commercially overloaded. If he then remained unaware of the specifics of the clipping it was only because he chose to remain unaware. Rudimentary investigation by a man in his position would have revealed to him precisely what the situation was.

168. Rule 73.1205 provides in pertinent part that:

"No licensee . . . shall knowingly issue to any . . . party, any . . . document which . . . misrepresents the quantity of advertising actually broadcast. . . . Licensees shall exercise reasonable diligence to see that their agents and employees do not issue any documents which would violate this section if issued by the licensee."

It is concluded that KORK violated this rule in two particulars.

169. The General Managers of the station issued documents to the network which they constructively knew contained misrepresentations as to the quantity of advertising actually broadcast. Mr. Reynolds, Sr., who as the ultimate owner of the station is to be regarded as the licensee within the meaning of the rule, exercised no diligence whatsoever to see that his agents and employees were complying with the rule. He delegated his entire authority to his son who issued instructions which invited violation of the rule and who, thereafter, elected to remain in ignorance of what was happening.

#### Issue 1(b): Misrepresentation

170. As detailed at paragraphs 24-41, *supra*, KORK's correspondence with the Commission as to its commercial

practices was rife with inaccurate and misleading statements. The station was deliberately pursuing a policy of scheduling more local commercials during network breaks than could possibly be accommodated. It had no way of being certain in advance just what network material would be covered, but it is chargeable with the knowledge that from time to time not only network "clutter," but intrinsic portions of the programs and commercial material as well must be lost. Nevertheless, the entire thrust of its correspondence is that the fault lay with switching errors by individual operators. Such assertions were false, and the station's executives knew it when the letters were written.

171. It is concluded that KORK's subject correspondence contained deliberate misrepresentations to the Commission, and was lacking in candor regarding its policies or practices in joining network programs after their beginning, leaving network programs before their end, and extending network station or commercial breaks so as to affect the content of network programs.

#### Issue 1(c): Absolute Qualifications of Western

172. It is the opinion of the presiding Judge that KORK's practice of accepting compensation for network commercials which it clipped was dishonesty deserving of the utmost censure. The situation is quite unlike the classic "double billing" where the station is only paid for what it actually delivered, and its offense lies in the issuance of false invoices which it knows will be improperly used by its local advertiser. Here the station made a practice of selling twice what it could only deliver once, and of collecting for its own benefit the proceeds of both sales.

173. Nor is the situation truly comparable to *Channel 13 of Las Vegas, Inc.*, 37 FCC 2d 518. Although both cases involved clipping of network material, in *Channel 13* the Commission was not called upon to consider evidence that the licensee had been accepting compensation for network

commercials which it had not broadcast. Plainly, the conduct shown on this record is more egregious than that which was before the Commission in *Channel 13*, and is deserving of more severe sanction.

174. However, even if it were to be determined that the fraudulent billing did not require disqualifications, the conclusions as to misrepresentation would remain. In case after case the Commission has repeated that it takes the most serious possible view of misrepresentation, *The Neighborly B/Casting Co., Inc.*, 24 RR 959; *Edina Corp.*, 7 RR 2d 767, *Palmetto Communications Corp.*, 10 RR 2d 32; *Radio B/Casters, Inc.*, 19 RR 2d 213; *Nick J. Chaconas*, 21 RR 2d 576. The thrust of the cited cases, and many others, is that the Commission's capability to perform its function rests on its ability to rely on the candor of its licensees. Hence, if any licensee demonstrates that such reliance has been misplaced, the Commission will conclude that the public interest is not served by continuance of the license.

175. Here the licensee deliberately and repeatedly strove to conceal from the Commission that it had a policy of clipping network programs. Its letters contained false statements of fact and misleading implications. It is concluded that Western Communications, Inc. has been shown to lack the qualifications requisite for renewal of its license for Station KORK-TV.

176. Nor is the foregoing conclusion mitigated by the fact that the misrepresentations were unknown to the ultimate owner of the licensee. This is not a case where, despite reasonable precautions, the owner was deceived by an employee. Mr. Reynolds, Sr. elected to completely remove himself from the day-to-day operation of his station. He delegated all of his authority, including the ability to deal with problems as they arose. His son, to whom the primary authority was delegated, first issued orders which invited the clipping, and then showed only the most casual interest when the consequences of his instructions appeared to in-

dicade trouble. The task of explaining to the Commission was delegated to the very subordinates who, if the Commission's inquiries were directed to real problems, were responsible for those problems. Under such circumstances, the ultimate owner of the station cannot be regarded as the innocent victim of his subordinates. A licensee can delegate his authority. He cannot delegate his responsibility to the Commission, *Continental B/Casting, Inc.*, 14 RR 2d 813.

#### Issue 1(d): Comparative Qualifications of Western

177. It having been concluded that Western lacks the basic qualification for renewal of its license, the matter of the impact of its conduct on its comparative qualifications has become moot.

#### Issue 2: Stations KFSA and KOLO

178. The issue as to the operation of Stations KFSA and KOLO was designated solely for the purpose of determining its significance to the comparative qualifications of Western. It having been determined that Western lacks the basic qualifications for renewal, no useful purpose would be served by formulating conclusions under this issue.

#### Issue 3: Meritorious Programming

179. As indicated at paragraph 56 and footnote 2, *supra*, the record contains no evidence directed to this issue.

#### Issue 4: Valley's Network Affiliation

180. It cannot be stated with reasonable certainty that Valley either will or will not be able to secure the NBC affiliation it proposes. If KORK is denied renewal, NBC would regard any one of the four commercial VHF stations in Las Vegas as a possible substitute. It inclines neither toward nor away from any of the four at this time.

181. However, in the event NBC was required to make a choice, Valley would enjoy certain advantages. The single most important factor in NBC's selection of an affiliate is the station's ability to deliver an unduplicated audience. Valley's proposed Grade B contour would cover more unduplicated population than would any of the other three stations. Its advantage ranges from a population of 2,410 (0.9%) to a population of 16,762 (6.3%). In addition, affiliation with Valley would permit NBC to continue its present channel identification in Las Vegas, although this is a factor of lesser significance.

182. On the other hand, Valley would have the disadvantage *vis-a-vis* all three of the other stations of being a new operation which NBC deems to be more trouble-prone than an existing station which is only acquiring a new network affiliation. In addition, the network looks to the financial stability of its affiliates, and, as hereinafter noted, Valley's financial prospects are cloudy.

183. In sum, Valley has a reasonable hope of securing the network affiliation. However, that expectation is less than a certainty, and it would be somewhat speculative even to describe its prospects as a strong probability. This element of doubt casts a shadow over Valley's entire financial proposal.

184. As noted at paragraph 63, *supra*, the bank loan, which is the keystone of Valley's financial plan, is available only if the NBC affiliation is secured. Consequently, unless Valley actually obtains the affiliation it will lack the financial resources to construct and operate its station. Conversely, until Valley establishes its financial stability NBC is unlikely to grant the affiliation, particularly where, as here, there is another VHF station available as an alternative affiliate. Hence, either NBC or the bank will have to be persuaded to commit itself in the expectation that favorable action by the other will ensue. Perhaps one or the other can be so persuaded, but the record does not indicate that either has made such a commitment.

#### Issue 5: Valley's Bank Loan

185. Valley's bank loan commitment letters of August 23, 1971 and February 22, 1973 fully satisfy the Commission's requirements. The problem, if any, arises in the reservations expressed by the President of the bank in his answers to Interrogatories 9-11 quoted at paragraph 64, *supra*.

186. The Commission has never required that an applicant proposing a bank loan have a contractually binding commitment from the bank. Traditionally, the Commission has accepted letters which outlined the terms of the proposed loan and stated, in effect, that if the borrower's credit status seemed as good when the loan was to be taken down as when the letter was written the described loan would be made. Hence, a large percentage of the bank commitment letters which have satisfied the Commission in the past have contained provisions to the effect that the loan was to be contingent upon the bank's being satisfied at the time the funds were actually sought that the borrower's credit standing had not deteriorated from the time the letter was written, *Community B/Casting Service*, 2 RR 2d 283.

187. In the opinion of the presiding Judge, the qualifications expressed by the President of the Nevada State Bank in his answers to Interrogatories 9 and 10, quoted at paragraph 64, *supra*, are no more than the routine reservations which the Commission has never found to render a bank commitment unreliable. However, his answer to Interrogatory No. 11 presents a more difficult problem. The thrust of that answer is that collateral, over and above the guarantees of Valley's shareholders, may be required, but that neither the necessity for collateral nor its amount has yet been decided. In short, the bank is saying that the maintenance of the existing credit status of the guarantors of the loan may not be good enough.

188. If the bank had expressly demanded collateral, it would have been necessary for Valley to show that such collateral was available, *Eastern Long Island B/Casting, Inc.*, 6 RR 2d 477. Here the matter is simply up in the air. In essence, the bank official's answer to Interrogatory No. 11 has placed Valley's commitment in the same position as that of the applicant in *Orange Nine, Inc.*, 9 RR 2d 1157, where the bank involved had stated that "the . . . security for such loans shall be determined at the time of borrowing and shall be acceptable to us." In that case an issue was added to determine, *inter alia*, the security required and whether the applicant could meet it.

189. Here the issue had been added before the Interrogatory was answered, but the distinction lacks materiality. If Valley was surprised by the answer—and it may well have been in view of the language of the commitment letters—it should have undertaken to clarify the matter. Having failed to do so, it is concluded that Valley has not met its burden of proof under the issue "to determine the terms and conditions of the proposed bank loan . . . [and] whether Valley can meet those terms and conditions. . . ."

#### Issue No. 6: Valley's Microwave Service

190. Valley has budgeted \$200,000 for microwave service to bring the NBC programming from Los Angeles to New York.<sup>14</sup> It has a proposal from a microwave common carrier to provide microwave service at an approximate cost of \$144,000 per year. It is concluded that Valley is financially qualified to provide for its required microwave service.

<sup>14</sup> As noted at footnote 11, *supra*, Valley's cost estimates have not been based on the specifics of its proposal. If the ultimate conclusion herein was that Valley has proven itself financially qualified under the existing issues, the presiding Judge would recommend remand under an expanded issue which would permit inquiry as to whether Valley's estimated costs are realistically related to the specifics of its proposal.

#### Issue 7: Site Access

191. This issue was added solely for the purpose of ascertaining whether Valley is financially capable of meeting the terms and conditions imposed on it for the use of the access road to its transmitter site which was built by Alta Development Co. On this record, that question cannot be answered.

192. It seems clear that, if the FCC issues Valley a construction permit, the BLM will issue Valley a permit to use its proposed antenna site and the Alta access road. However, what it will have to pay Alta is sheer guesswork.

193. The BLM will not set the price or even arbitrate the matter. Hence, Valley and Alta will have no forum to decide the controversy other than the United States District Court. The decision of that Court is not reasonably predictable.

194. However, it seems unlikely that the Court would rule that Valley is entitled to use the fruits of Alta's labors without compensation. The terms of the BLM permit, which the Court would be called upon to interpret and enforce, seem to contemplate that something will be paid, for they provide that "... other . . . grantees and Hughes Tool Company will make the necessary arrangements between themselves for use and maintenance of the access road."

195. Possibly the Court will undertake to do equity, and establish some formula which will require Valley to pay to Alta a fair price. However, even if it be assumed that such a decision is the probable outcome, little help is provided in resolving the issue which has been designated.

196. What might the Court deem to be a fair price? Will it accept Western's calculations or will it reduce them? If it reduces them, by how much? Specifically, if they are reduced, will it be to a figure within the \$100,000 which Valley has budgeted? The answers to all of these questions must be entirely conjectural. Yet, without answers any conclusion as to whether Valley is or is not financially able

to obtain access to its site would be sheer speculation. Under such circumstances, it must be concluded that Valley has failed to meet its burden of proof under the issue.

197. In reaching the foregoing conclusion the presiding Judge is not insensitive to the fact that Western has, in effect, been allowed to quote terms which seriously impair its opponent's financial showing. Nevertheless, the situation is entirely of Valley's own making. It elected to submit a proposal which it knew or should have known depended in part upon the cooperation of the licensee it was seeking to displace. It cannot claim surprise that the attitude of such licensee has been less than charitable. Under such circumstances, no equities are established which compel unusual remedial action by the Commission.

#### Issue 8: Valley's Financial Qualifications

198. Valley's financial showing has been less than satisfactory. While it has demonstrated a prospect of obtaining a network affiliation, that prospect is less than a reasonable probability. If it fails to secure the affiliation, its bank loan will be unavailable, and its entire scheme of financing will crumble.

199. Moreover, Valley has failed to establish with reasonable certainty that its bank loan will not require collateral, or, if collateral is required, what it will be and that Valley can provide it. The matter simply has not been decided by the bank, and the bank does not intend to decide until such time as Valley actually seeks the money.

200. Plainly, the bank loan and the network affiliation are interdependent. The bank will not make the loan without a network affiliation. The network, which is interested in the financial stability of its affiliates, will not affiliate without the bank loan. Possibly Valley can persuade either the network or the bank to act first and thereby persuade the other to favorable decision. Possibly not. The Commission is being

asked to gamble the public interest on Valley's ability to resolve the uncertainties in its favor.

201. Finally, Valley has failed to demonstrate that it can secure access to its site at a price it can afford to pay. Almost certainly the matter will have to be litigated. The result may favor Valley. It may not. Again, the Commission is being asked to gamble that Valley can solve its problem.

202. In short, Valley has failed to demonstrate with reasonable certainty that crucial elements of its proposal are feasible. The record does not demonstrate with certainty that Valley's plans will not work. It merely leaves substantial doubts. It is concluded that Valley has failed to carry its burden of proving that it is financially qualified to construct and operate its proposed station.

#### Issue 9: Mr. Gold

203. The record fails to establish that Meyer Gold misrepresented his reasons for selling his Las Vegas radio station in his 1969 transfer application. He asserted he wanted to devote more time to the operation of his Lompoc station and to the development of a new program concept. In fact, after the sale of the Las Vegas station he did direct time and attention to these activities. However, after he got more deeply into them he came to the conclusion that they were unworthy of full-time pursuit. That alone is considerably less than enough evidence to warrant a conclusion that his representation was false when he made it.

204. He acknowledges that the profit he made on the sale was one of the factors which influenced his decision. He states that he did not believe it was necessary to note this in his application because he deemed it to be self-evident from the balance of the application. This assertion is plausible. Unless it be shown that financial gain was a primary motive underlying the sale, no useful purpose would be

served by requiring transferors to state that they enjoy making a profit.

#### Issue 10: Comparative

205. It has been concluded that each of the applicants has failed to establish its basic qualifications. Under such circumstances, consideration of the comparative issue has been rendered moot.

#### Issue 11: Ultimate Issue

206. It has been heretofore concluded that neither of the applicants demonstrated that it possesses all of the basic qualifications requisite to a grant. The public interest would not be served by a grant of either application.

Accordingly, IT IS ORDERED, That unless an appeal is taken to the Commission by a party or the Commission reviews the Initial Decision on its own motion in accordance with Rule 1.276,<sup>15</sup> the applications of Western Communications, Inc. and Las Vegas Valley Broadcasting Co. ARE DENIED.

CHESTER F. NAUMOWICZ, JR.  
*Administrative Law Judge*  
FEDERAL COMMUNICATIONS COMMISSION

<sup>15</sup> Under Rule 1.276, appeals (in the form of exceptions to the Initial Decision) must be filed within thirty (30) days of the public release date of the full text hereof, unless an extension of time is duly granted. In the event no exceptions are filed and the Commission has not undertaken to review the Initial Decision during the prescribed 50-day period, or taken any of the actions specified in paragraph (c) of Rule 1.276, the Initial Decision becomes effective pursuant to paragraph (c) of Rule 1.276.

#### APPENDIX D

FCC 76-318  
40133

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of

WESTERN COMMUNICATIONS, INC.  
(KORK-TV) Las Vegas, Nevada

For Renewal of License

LAS VEGAS VALLEY BROADCASTING Co.,  
Las Vegas, Nevada

For Construction Permit for New Television  
Broadcast Station

Docket No. 19519

File No. BRCT-327

Docket No. 19581

File No. BPCT-4465

#### MEMORANDUM OPINION AND ORDER

(Adopted: April 2, 1976; Released: April 8, 1976)

By the Commission:

1. The Commission has before it for consideration: (a) a "Request for Proper Investigatory Proceeding" filed on March 22, 1976 by Western Communications, Inc. (Western); (b) a letter on the same subject filed by Western on March 18, 1976; and (c) a Partial Opposition to the request filed by Las Vegas Valley Broadcasting Co. (Valley) on March 29, 1976.

2. On March 9, 1976, the Commission heard oral argument in the restricted adjudicatory proceeding in Docket

Nos. 19519 and 19581. At the conclusion of the oral argument, the Commission met privately and instructed its staff to prepare an opinion consistent with its decision to deny renewal of Western's license to operate Station KORK-TV; no decision was made as to the disposition of Valley's competing application. Subsequently, certain reports appeared in the press disclosing the results of the Commission's deliberations, even though no official public release had been made and no announcement authorized.

3. Thereafter Western filed a formal complaint pursuant to Section 19.735-107, alleging that unknown Commission personnel had violated Sections 19.735-101 and 206 of the Commission's Rules, and requesting: (a) that an investigation be conducted pursuant to Section 19.735-107 to detect the source of the apparent unauthorized disclosure; (b) that the parties be informed of the results of this investigation; (c) that pending completion of the investigation all work within the Commission in connection with Dockets 19519 and 19581 be suspended; and (d) that appropriate remedial action be taken against any Commission personnel found to have violated the rules.

4. Valley's Partial Opposition did not oppose Western's request for an investigation, but did oppose any delay or suspension of Commission action in the docketed proceedings.

5. Regrettably we must again consider the effect on an adjudicatory matter of an apparent "news leak." As we stated in *TelePrompTer Cable Systems, Inc.*, 52 FCC 2d 1263, 1272 (1975), "we join with counsel in deploring the news leak. . . . Such news leaks are inconsistent with proper judicial conduct and decorum." In view of our continued concern with these premature disclosures, the Commission has ordered that there be an investigation, pursuant to Section 19.735-107, 206 of the Rules, to attempt to identify the source of the "leak" and to determine whether any Commission personnel may have been guilty of professional

misconduct and/or violation of the Commission's Rules and Regulations.<sup>1</sup>

6. However, we cannot accept Western's suggestion that it has suffered prejudice amounting to legal error as a consequence of the disclosure; nor can we accept the suggestion that we suspend the docketed proceedings. We fail to see how the premature publicity present in this case prejudiced Western's legal rights in any degree. On at least six occasions in its pleadings, Western claims "serious and irrevocable damage and prejudice"<sup>2</sup>; but nowhere does Western offer factual support for this conclusion or make explicit exactly how it has been prejudiced. Certainly the mere fact the Commission's preliminary decision in this case was made public is not, in and of itself, prejudicial. Such early disclosures are an established and lawful feature of the administrative process. See *Eastern Air Lines v. CAB*, 271 F.2d 752 (2nd Cir. 1959), *cert. denied*, 362 U.S. 970 (1960)<sup>3</sup>; *cf.*, *FTC v. Cinderella Career and Finishing Schools, Inc.*, 404 F.2d 1308 (D.C. Cir. 1968); nor do we understand why prejudice would arise merely because the publicity was unauthorized. Western has cited no cases, and we are aware of none, which would compel any such result as a matter of law, and in the absence of special facts tending to show prejudice in the particular case, the submission must be rejected. Indeed, in the circumstances here presented, it is the Commission itself which is aggrieved by the unauthorized publicity. Secrecy of deliberations, when the Commission sits to decide a restricted proceeding, is

<sup>1</sup> Pursuant to Section 19.735-107 of the Commission's Rules the Chairman has appointed the Security Officer to conduct this investigation.

<sup>2</sup> See page 7n, page 8, page 10n, page 11, page 12 and page 13 of Western's Request.

<sup>3</sup> The Commission at one time used a similar procedure. *Compare*, FCC public notice, No. 41611, February 7, 1957, with No. 62-1149, 26191, dated November 1, 1952.

intended to insulate the Commission from improper contacts and last-minute stratagems designed to influence the final decision; and to promote a calm atmosphere for collegial discussion and reflection.<sup>4</sup> These considerations are intended to facilitate the Commission's decision-making functions, but they are not required by principles of elemental fairness or due process of law. Accordingly, unauthorized publicity cannot be the basis, without more, for upsetting a decision regularly arrived at, following procedures substantively and procedurally adequate to determine the facts and the law relevant to the resolution of the case.

7. So also do we reject the implied request that the Commission disqualify itself if, following investigation, it is found that a Commissioner was the source of the apparent leak. Even if it were assumed, *arguendo*, that a Commissioner were the source of the unauthorized publicity, it would not necessarily follow as a matter of law from our rules that this Commissioner would automatically be disqualified nor, in the ordinary case would such disqualification be imposed without allegation of personal bias, prejudice, actual malice, or improper *ex parte* influence. To adopt, however, a rule as broad as that suggested by Western, that the action of a single Commissioner might taint the decision of the entire Commission, would be tantamount to giving any member of a collegial tribunal a power of veto over the vote of the majority, simply by prematurely publicizing, and thereby (in Western's view) "tainting" the decision. We conclude that any "news leak" in this case is essentially a matter solely for our internal disciplinary procedures. The alleged "leak" occurred after a preliminary decision has been reached, and it had no connection with the substantive issues involved in the case. In this regard,

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<sup>4</sup> An additional purpose served by withholding notice of action taken until a final opinion is ready for release is avoiding possible misunderstandings, by members of the public as well as by litigants, as to the exact nature and scope and reasons for the Commission's decision.

the situation here is radically different from that in *Sangamon Valley Television Corporation v. United States*, 269 F. 2d 221 (D.C. Cir. 1959) relied on by Western. The rule violation in *Sangamon*, *ex parte* presentations went to the very core of the Commission's quasi-judicial powers and tainted the basic fairness of the proceeding. The Commission finds that the alleged "leak" has not interfered in any way with the basic integrity, fairness or impartiality of its decision in these Dockets.

8. Accordingly, IT IS ORDERED, That Western's request for an investigation pursuant to Section 19.735-107 is GRANTED. Western's requests for remedial action and for all parties to receive a copy of the results of the investigation is premature and will be ruled upon at the conclusion of the investigation. In all other respects Western's petition is DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

VINCENT J. MULLINS  
Secretary

FCC 76-324  
40219

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

In the Matter of  
WESTERN COMMUNICATIONS, INC.,  
(KORK-TV) LAS VEGAS, NEVADA  
For Renewal of License  
LAS VEGAS VALLEY BROADCASTING CO.  
LAS VEGAS, NEVADA  
For Construction Permit for New Television  
Broadcast Station  
Docket No. 19519  
File No. BRCT-327  
Docket No. 19581  
File No. BPCT-4465

**MEMORANDUM OPINION AND ORDER**

Adopted: April 14, 1976; Released: April 19, 1976

**BY THE COMMISSION:**

1. This Order concerns a "Contingent Reply to Partial Opposition" lodged by Western Communications, Inc. (Western) on April 5, 1976. The reply was addressed to an Opposition filed by Las Vegas Valley Broadcasting Co. (Valley) in response to an original pleading in which Western requested an investigation into an alleged "leak" of information concerning the Commission's decision not to renew the license of Western's Station KORK-TV.

2. Western's original pleading filed on March 19, 1976, and Valley's opposition filed on March 29, 1976,<sup>1</sup> were considered under the provisions of Section 1.291 and 1.294 of the rules which govern interlocutory actions in hearing proceedings. On April 2, 1976, the Commission adopted and released<sup>2</sup> its decision on the issues raised by the interlocutory pleadings.

3. Western's reply is being returned without consideration since it is an unauthorized pleading. Section 1.294(b) of the rules provides that a reply to an opposition will not be entertained. Furthermore, since the Commission's decision on Western's original "Request for Proper Investigatory Proceedings" was adopted and released on April 2, 1976, and Western's reply was not lodged until April 5, 1976, it was impossible for the Commission to consider the reply when ruling on the pleadings.<sup>3</sup>

4. Accordingly, IT IS ORDERED, That Western's "Contingent Reply to Partial Opposition" lodged with the Com-

<sup>1</sup> In the interest of justice, Section 1.294(b) was waived and Valley's opposition was considered though filed three days late. See Sections 1.3 and 1.4 of the rules.

<sup>2</sup> We shall retain the April 5, 1976, covering letter, submitted with this pleading, because the letter complains—timely although mistakenly—of an alleged second leak in these Dockets. Counsel incorrectly inferred that the document announcing the Commission's action in connection with the initial leak in this proceeding had itself been leaked. In fact, the Commission's action concerning the first leak was adopted and released Friday, April 2, 1976—three days before date of counsel's letter. Although we retain the letter, we think it obvious no "second" leak occurred, and accordingly, we do not reach counsel's allegations concerning the prejudicial impact on Western's rights of this alleged "second" leak. The Commission's April 2, Order was re-released, with minor typographic corrections, on April 8, 1976.

<sup>3</sup> In its original pleading Western specifically requested expedited action by the Commission.

150a

mission on April 5, 1976, Is NOT ACCEPTED FOR FILING, shall be removed from the Docket files and shall be returned to Western without consideration.

FEDERAL COMMUNICATIONS COMMISSION  
VINCENT J. MULLINS  
Secretary

151a

F.C.C. 76-607

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of

WESTERN COMMUNICATIONS, INC.  
(KORK-TV) LAS VEGAS, NEVADA

For Renewal of License

LAS VEGAS VALLEY BROADCASTING CO.  
LAS VEGAS, NEVADA

For Construction Permit for New Television  
Broadcast Station

Docket No. 19519  
File No. BRCT-327

Docket No. 19581  
File No. BPCT-4465

MEMORANDUM OPINION AND ORDER

(Adopted: June 29, 1976; Released: July 1, 1976)

BY THE COMMISSION:

1. The Commission has before it for consideration several pleadings which have been filed in this proceeding during the past two months. We take this opportunity to rule on the issues raised by these pleadings.

2. On April 14, 1976, Western Communications, Inc. (Western) filed a "Request For Further or Expanded Proper Investigation Due To Additional Prohibited News Leaks." Subsequently, Western filed: Supplement to this

initial pleadings on April 16, 1976; Second Supplement on April 20, 1976; Third Supplement on May 12, 1976; and Fourth Supplement on June 16, 1976.<sup>1</sup> Las Vegas Valley Broadcasting filed a single Opposition to the "Request For Further or Expanded Proper Investigation Due To Additional Prohibited News Leaks" and the first and second supplements. The Commission's Broadcast Bureau filed a "Limited Comment" on an *ex parte* matter raised by Western's Second Supplement.

3. In its pleadings Western raises two primary issues—one related to alleged unauthorized disclosures and one related to alleged *ex parte* contacts. The pleadings request that we suspend these proceedings and conduct further investigations into the matters raised by Western.

4. Western alleges that the text of the Commission's Order adopted on April 2, 1976 (FCC 76-318), which was related to Western's "Request For Proper Investigatory Proceedings" was disclosed to members of the press in an unauthorized fashion. Western made this allegation because an item concerning the Commission's decision appeared in the trade press on April 5, 1976, several days before Western received its copy of the decision in the mail.

5. As we stated in footnote 2 to our Order of April 14, 1976 (FCC 76-324) which concerned Western's "Contingent Reply to Partial Opposition" there was no unauthorized disclosure of the April 2nd order. This order was adopted on April 2nd and released late that afternoon. The order was released by Mr. Sam Sharkey, Public Information Officer, who placed between sixty and seventy copies of the order on the public distribution table at approximately 4:15 p.m. During the following week, after several

<sup>1</sup> Each of these numbered supplements was accompanied by a motion for leave to file the particular supplement. These various motions to file are granted.

minor typographic corrections were made and additional copies of the decision were printed, the order was re-released during the normal course of business. While it seems that Western encountered some difficulty in obtaining a copy of the Order on April 5th from Commission employees who were evidently unaware of the release, we have been assured by Mr. Sharkey that the order has been available from his office since the time it was released on April 2, 1976.

6. With regard to the *ex parte* allegations, Western claims that the trade press stories of March 15, 1976, which were discussed in our April 2nd Order, in and of themselves create a strong appearance of repeated *ex parte* violations. This *ex parte* argument is now advanced for the first time although Western had ample opportunity to make it in its pleading of March 19, 1976. This appears to be an attempt to obtain Commission reconsideration of our order of April 2nd despite Section's 1.106 (47 CFR § 1.106) prohibition against the filing of Petitions for Reconsideration in interlocutory matters.<sup>2</sup> Nevertheless, we note this argument and find that it does not provide a basis for conducting an expanded or additional investigation. The trade press stories indicate that the press became aware of the contents of a Commission decision. However, since generally members of the press do not have an interest in the outcome of the proceeding, such knowledge is not of itself evidence of prohibited *ex parte* contacts but rather evidence that there was an unauthorized disclosure. By the Order of April 2nd and the subsequent investiga-

<sup>2</sup> The heading of the pleading is not determinative but rather the contents of the document. Although Western styled its pleading as Further Request for Expanded Investigation and supplements thereto, most of the arguments therein seek reconsideration of the Commission findings in its Order of April 2, 1976. These arguments have not been considered. 47 CFR § 1.106.

tion, the Commission has taken the appropriate action warranted by the appearance of these news stories.

7. Western also claims in its first pleading that there was prohibited *ex parte* contact because a story which appeared in *Broadcasting*<sup>3</sup> purports to be based on a discussion between Chairman Wiley and a trade press representative concerning the specific complaint made by Western in its counsel's letter of March 18, 1976. Aside from this allegation Western has presented no facts which indicate that there was any attempt to influence the decision in this matter. It is apparent, from the article, that the Chairman did not discuss Western's pleading. In fact, the report indicates that Chairman Wiley would not even confirm reports of such a request, although he indicated his concern about leaks of adjudicatory matters.

8. Furthermore, the conversation as indicated by the article is not a "presentation" as defined in Section 1.201(f) of our rules (47 CFR § 1.201(f)).<sup>4</sup> See *Rules Governing Ex Parte Communications*, 1 FCC 2d 49, 56-59 (1965). We specifically reject Western's assertion that the

<sup>3</sup> The following appeared in *Broadcasting*, March 22, 1976: Attorney for KORK-TV Las Vegas has written FCC to suggest "full investigation of the improper discussions/leaks" which led to trade press reports that Commission had tentatively decided to deny renewal of KORK-TV's license ("Closed Circuit," March 15). Edgar F. Czarra Jr. said Western Communications, Inc. (Don Reynolds), licensee, "has been seriously damaged and prejudiced" by those reports and its rights "fundamentally violated". He also said Western intends to seek "all available remedies in all appropriate forums." FCC Chairman Richard E. Wiley, while stressing he was not confirming reports, expressed concern about leaks concerning adjudicatory matters, said they must be stopped and that he had "several ideas" as to how that might be accomplished.

<sup>4</sup> Section 1.1201(f) states: Presentation. Any communication going to the merits or outcome of any aspect of a restricted proceeding.

investigation conducted by the Commission's Security Officer into the alleged "leaks" went to the merits or was an "aspect" of the restricted proceeding. Rather it was an internal personnel investigation conducted pursuant to Section 19.735-107(b) (47 CFR § 19.735-107(b)) of our Rules. See paragraph 7 of April 2nd Order, FCC 76-318. Aside from the obvious fact that the alleged unauthorized disclosure occurred during the course of this docketed proceeding, the investigation was not related to this proceeding, and the results of the investigation will not affect the merits or outcome of this proceeding in any way.

9. As we noted previously, trade press reporters are not interested parties within the definition of the term in Section 1.1201(e) (47 CFR 1.1201(e)) since typically they have no interest in the outcome of the proceeding within the intendment of our Rules. That section defines "interested person" as one with an interest in the outcome of the restricted proceeding, i.e., the license renewal and the construction permit application. Furthermore, members of the press may request information from anyone at the Commission with regard to the status of any phase of a restricted adjudicatory proceeding at any time. 47 CFR § 1.1227(e).

10. As to Western's *ex parte* arguments in its first pleading regarding the news media's disclosure of the contents of the Commission's Order released to the public on April 2nd, we have considered them but do not believe they provide any reason for an investigation. As we have indicated, the Order was released on Friday, April 2nd which was prior to the printing in the trade press.

11. As to Western's claim in its "Second Supplement to Request For Further Or Expanded Proper Investigation Due To Additional Prohibited News Leaks" that there was a prohibited *ex parte* contact between Counsel for the Broadcast Bureau and the Office of Opinions and Review, we find that it is without basis. On April 7th, the

Chief of the Hearing Division was given a copy of the Commission Order of April 2nd by the Office of Opinions and Review. However, as noted in the Broadcast Bureau's comments, there was no discussion of its merits and the document was a matter of public record. Thus, there was no violation of the *ex parte* rules.

12. Finally, in our Order of April 2nd we deferred action on a request by Western that a copy of the investigation and recommendations be made available to the parties. Since that time the Security Officer has completed his report, and on May 25, 1976, the Commission authorized the release of the report to the parties in Dockets Nos. 19519 and 19581. The General Counsel sent copies of this report to all of the parties on June 10, 1976. In its Fourth Supplement, Western alleges that since an article concerning the report appeared in the June 14, 1976, edition of *Broadcasting* there was an unauthorized disclosure of this report. However, since the report was released to the parties on June 10th, several days before the article appeared, and since the report was concerned with personnel matters not at issue in Docket Nos. 19519 and 19581, we do not believe any further or additional investigation is warranted or necessary.

Therefore, IT IS ORDERED, That Western's Motions concerning a Further or Expanded Proper Investigation Due to Additional Prohibited News Leaks in all respects ARE HEREBY DENIED.

IT IS FURTHER ORDERED, That Western's request for remedial action, as contemplated by Section 19.735-107(c) of the Commission's Rules, as contained in a pleading entitled "Request For Proper Investigatory Proceedings," filed on March 19, 1976, IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION,  
VINCENT J. MULLINS, *Secretary*.

## APPENDIX E

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1978

No. 76-2104

LAS VEGAS VALLEY BROADCASTING Co., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*  
WESTERN COMMUNICATIONS, INC., *Intervenor*

And Consolidated Case No. 76-2124

Filed December 29, 1978

BEFORE: WRIGHT, Chief Judge; BAZELON and WILKEY,  
Circuit Judges.**Order**

Upon consideration of the petition for rehearing filed by intervenor Western Communications, Inc., it is

ORDERED, by the Court, that intervenor's aforesaid petition is denied.

*Per Curiam*

For the Court:

/s/ GEORGE A. FISHER  
George A. Fisher  
Clerk

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1978

No. 76-2104

LAS VEGAS VALLEY BROADCASTING Co., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*  
WESTERN COMMUNICATIONS, INC., *Intervenor*

And Consolidated Case No. 76-2124

Filed December 29, 1978

BEFORE: WRIGHT, Chief Judge; BAZELON, McGOWAN,  
TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB, and  
WILKEY, Circuit Judges.

**Order**

The suggestion for rehearing *en banc* filed by intervenor Western Communications, Inc., having been transmitted to the full Court and no Judge having requested a vote with respect thereto, it is

ORDERED, by the Court, *en banc*, that intervenor's aforesaid suggestion for rehearing *en banc* is denied.

*Per Curiam*

For the Court:

/s/ GEORGE A. FISHER  
George A. Fisher  
Clerk

**APPENDIX F**

5 U.S.C. § 557(c)(3)(A) provides:

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

5 U.S.C. § 706(2)(E) provides:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

47 U.S.C. § 301 provides:

It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or district; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign

country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

47 U.S.C. § 307(d) provides:

(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses, and not to exceed five years in the case of other licenses, if the Commission finds that public interest, convenience, and necessity would be served thereby. In order to expedite action on applications for renewal of broadcasting station licenses and in order to avoid needless expense to applicants for such renewals, the Commission shall not require any such applicant to file any information which previously has been furnished to the Commission or which is not directly material to the considerations that affect the granting or denial of such application, but the Commission may require any

new or additional facts it deems necessary to make its findings. Pending any hearing and final decision on such an application and the disposition of any petition for rehearing pursuant to section 405 of this title, the Commission shall continue such license in effect. Consistently with the foregoing provisions of this subsection, the commission may by rule prescribe the period or periods for which licenses shall be granted and renewed for particular classes of stations, but the commission may not adopt or follow any rule which would preclude it, in any case involving a station of a particular class, from granting or renewing a license for a shorter period than that prescribed for stations of such class if, in its judgment, public interest, convenience, or necessity would be served by such action.

47 U.S.C. § 308(b) provides:

(b) All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee.

47 U.S.C. 309(a) provides:

(a) Considerations in granting application.

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

47 U.S.C. § 402(b) provides:

(b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1)—(4) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

47 C.F.R. § 19.735-206 provides:

Except as provided in § 19.735-203(c), or as authorized by the Commission, an employee shall not, directly or indirectly, disclose to any person outside the Commission any information, or any portion of the contents of any document, which is part of the Commission's records or which is obtained through or in connection with his Government employment, and which is not routinely available to the public and, with the same exceptions, shall not use any such documents or information except in the conduct of his official duties. Conduct intended to be prohibited by this section includes, but is not limited to, the disclosure of information about the content of or scheduling of agenda items or other staff papers to persons outside the Commission, and disclosure of actions or decisions by the Commission prior to the public release of such information.

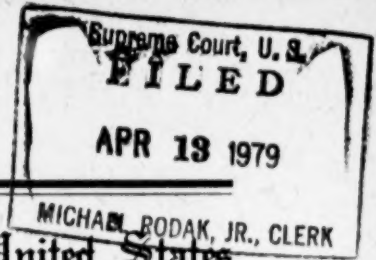
During the KORK-TV license term at issue (1968-71), 47 C.F.R. § 73.1205 provided:

"§ 73.1205 Fraudulent billing practices.

No licensee of a standard, FM or television broadcast station shall knowingly issue to any local, regional or national advertiser, advertising agency, station representative, manufacturer, distributor, jobber or any other party, any bill, invoice, affidavit or other document which contains false information concerning the amount actually charged by the licensee for the broadcast advertising for which such bill, invoice, affidavit or other document is issued, or which misrepresents the nature[, ] *or which misrepresents the quality of advertising actually broadcast (number or length of advertising messages) or the time of day or date at which it was broadcast.* Licensees shall exercise reasonable diligence to see that their agent and employees do not issue any documents which would violate this section if issued by the licensee."<sup>1</sup>

<sup>1</sup> The Commission first adopted its fraudulent billing rule in 1965, 1 F.C.C.2d 1068, 1070. The text of the original rule is set out in the paragraph above. Except for a single clarifying amendment adopted in 1970, 23 F.C.C.2d 70, the rule remained unchanged during the KORK-TV license term. The brackets indicate language deleted by the 1970 amendment; italicized language was added in 1970. Prior to the 1970 amendment, there were three separate but identical fraudulent billing rules: Section 73.124 (AM), Section 73.299 (FM), and Section 73.678 (TV). The 1970 amendment consolidated the rule as Section 72.1205.

No. 78-1222



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**In the Supreme Court of the United States**

OCTOBER TERM, 1978

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**WESTERN COMMUNICATIONS, INC., PETITIONER**

**v.**

**FEDERAL COMMUNICATIONS COMMISSION AND  
LAS VEGAS VALLEY BROADCASTING CO.**

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**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT**

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**BRIEF FOR THE FEDERAL COMMUNICATIONS  
COMMISSION IN OPPOSITION**

---

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**In the Supreme Court of the United States**

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No. 78-1222

WESTERN COMMUNICATIONS, INC., PETITIONER

v.

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT*

---

**BRIEF FOR THE FEDERAL COMMUNICATIONS  
COMMISSION IN OPPOSITION**

---

**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-16a) is not yet reported. The decision of the Federal Communications Commission (Pet. App. 17a-54a) is reported at 59 F.C.C. 2d 1441. The opinion and order of the Federal Communications Commission denying a petition for rehearing (Pet. App. 55a-61a) is reported at 61 F.C.C. 2d 974. The decision of the Commission's administrative law judge (Pet. App. 62a-142a) is reported at 59 F.C.C. 2d 1463.

**JURISDICTION**

The judgment of the court of appeals was entered on October 26, 1978. Petitions for rehearing and rehearing en banc were denied on December 29, 1978 (Pet. App. 157a,

158a). The petition for writ of certiorari was filed on February 5, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### QUESTION PRESENTED

Whether the Federal Communications Commission properly denied the renewal of petitioner's broadcast license because petitioner had violated the Commission's rules governing fraudulent billing practices and because petitioner had made misrepresentations to the Commission.

#### STATEMENT

Petitioner Western Communications, Inc., the licensee of KORK-TV in Las Vegas, Nevada, sought renewal of its license in 1972. Because the Commission had questions regarding petitioner's qualifications, an adjudicatory hearing was ordered on its renewal application. The purpose of the hearing was to determine whether petitioner had engaged in fraudulent billing, in violation of Commission rules,<sup>1</sup> and whether it had made misrepresentations in responding to the Commission's inquiries about its billing practices (Pet. App. 63a).

<sup>1</sup>KORK-TV is an NBC affiliate. Its affiliation contract prohibited the deletion of any part of the network transmission without prior written authorization from NBC (Pet. 4; Pet. App. 66a-67a). KORK's compensation for carrying sponsored network programs is based on the number of network-originated commercial minutes it broadcasts.

To collect payment, KORK was required to submit a weekly Television Station Report, on a form provided by NBC, showing the NBC programs and commercials carried and indicating any departure from the total material transmitted by the network. With minor exceptions, KORK's contract required that it broadcast each program accepted, along with network commercials, logos, and promotional advertisements, without deletion (Pet. App. 67a). Each Station Report contained an affidavit signed by a station official certifying that there had been no deletions of network transmission except where indicated. KORK does not deny that at least some of those reports were inaccurate and that it overbilled NBC.

At the time petitioner's license came up for renewal, respondent Las Vegas Valley Broadcasting Company ("Valley") sought a construction permit to build and operate a new station. Valley's and petitioner's mutually exclusive applications were set for a comparative hearing to determine which would best serve the public interest (Pet. App. 2a, n.1). Specific questions were also raised regarding Valley's financial qualifications (Pet. App. 65a).

The administrative law judge concluded that petitioner had repeatedly violated the Commission's rules prohibiting fraudulent billing<sup>2</sup> and that it had misrepresented or misled the Commission about its practices (Pet. App. 67a-70a, 73a-83a).<sup>3</sup> On those grounds, the administrative law judge concluded that petitioner was unqualified for renewal. The judge also concluded that Valley's application should be denied because it had failed to prove that it was financially qualified to construct and operate its proposed station (Pet. App. 141a).<sup>4</sup> Because the administrative law judge found neither applicant qualified to hold a license, he reached no conclusions as to their comparative qualifications (Pet. App. 135a-142a).

<sup>2</sup>The administrative law judge concluded that the "clipping" or deletion of network transmissions, including commercials, was a regular and frequent practice at KORK and a considered, deliberate, and integral part of petitioner's operation of the station. Petitioner followed this practice, the administrative law judge found, in order to insert additional local commercials (Pet. App. 68a-71a). He found that these deletions were generally not reported to NBC (Pet. App. 67a), and that the practices that resulted in petitioner's fraudulent billing were directed by two successive general managers of the station whose superiors were chargeable with knowledge of the practice (Pet. App. 67a-72a).

<sup>3</sup>The Commission made four separate inquiries to petitioner about its billing practices. The administrative law judge found that petitioner's responses were either false or designed to mislead the Commission as to petitioner's actual billing practices (Pet. App. 82a).

<sup>4</sup>The challenge of Valley's financial qualifications grew out of questions regarding its ability to finance access to its proposed

The Commission affirmed the administrative law judge's findings with respect to petitioner's fraudulent billing practices and misrepresentations to the Commission (Pet. App. 17a). It concluded that the evidence established that KORK-TV was "off network" for significantly longer periods than authorized, that as a general practice it "clipped" all or parts of network commercials in order to telecast local advertising, and that it billed NBC for commercials that were not carried (Pet. App. 21a). In addition, the Commission found that viewer complaints and Commission correspondence should have alerted the station managers' superiors to the possibility of wrongdoing (Pet. App. 25a; see also Pet. App. 33a-34a). Noting that under Commission rules a violation can occur "when a licensee knowingly issues bills predicated on false information \* \* \* or is so derelict in the management of its station's affairs as to permit fraudulent billing" (Pet. App. 23a), the Commission held that the record plainly established that the station's managers, who were also officers and directors of petitioner, knew or should have known that the reports they were certifying and submitting to NBC were patently false (Pet. App. 22a-23a).

The Commission also found ample support for the judge's findings that petitioner had not responded candidly to Commission inquiries about billing practices at the station and that it had made a number of substantial and material misrepresentations "clearly designed to conceal its operating practices \* \* \*" (Pet. App. 26a-32a). As a result of the fraudulent billing, lack of candor, and misrepresentations, the Commission concluded that petitioner was not qualified to have its license renewed (Pet. App. 45a). The Commission also affirmed

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transmitter site (Pet. App. 95a-98a, 139a-140a) and the availability of a bank loan that formed the basis for its financial proposal (Pet. App. 88a-93a, 137a-138a, 140a-141a).

the administrative law judge's conclusion that Valley had failed to prove that it was financially qualified and that its application should therefore be denied (Pet. App. 37a-40a).

The court of appeals affirmed the Commission's decision with respect to petitioner. It held that there was substantial evidence supporting the Commission's conclusions regarding petitioner's fraudulent billing practices and misrepresentations. The court rejected petitioner's claim that it lacked notice of the Commission's policy with regard to such billing practices, pointing out that the Commission has repeatedly articulated its strong objections to fraudulent billing since 1962 (Pet. App. 7a).<sup>5</sup> The court also rejected petitioner's contention that denial of license renewal was an unduly severe sanction. It noted that the Commission has held, and the courts have affirmed, that misrepresentation is a valid ground for nonrenewal of a license. Moreover, the court concluded that the Commission's action fell well within the broad discretion accorded agencies in fashioning remedies to enforce compliance with agency policy (Pet. App. 7a-8a).

The court of appeals reversed the Commission's decision as to Valley, holding that there was insufficient support for the Commission's finding that Valley was not financially qualified. The court remanded the case to the Commission for reconsideration of Valley's present financial qualifications in view of the passage of time since its original application (Pet. App. 15a).

#### ARGUMENT

The decision of the court of appeals with respect to petitioner is correct. In any event, the cases involves no issue that merits further review.

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<sup>5</sup>The court found that "[e]ven without specific Commission prohibition of clipping, the practice would appear manifestly

1. The Commission's decision that petitioner had engaged in fraudulent billing and misrepresentation that disqualified it from renewing its license is plainly supported by substantial evidence. Petitioner does not seriously contend otherwise. Instead, it contends that the Commission should be permitted to deny renewal of a license only on "clear and convincing" evidence that the licensee does not possess the necessary qualifications (Pet. 11).

This case involves the Commission's denial of an application for renewal of a broadcast license. There is no support in the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, or in any case for the proposition that denial of renewal of a broadcast license requires proof of a rule violation by clear and convincing evidence. Denial of a license renewal application is not a penal measure. *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946). Nor is it a deprivation of property, because a licensee's right to broadcast terminates when his license expires. 47 U.S.C. 301; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).<sup>6</sup> When a license expires, the applicant for renewal has the burden of demonstrating that the public interest, convenience, and necessity would be served by granting it a license to operate for an additional period. 47 U.S.C. 309(e).<sup>7</sup>

fraudulent. But in this situation, KORK's contract with the network, the Commission's 1970 statement, and the Commission's rule all clearly barred clipping" (Pet. App. 7a).

<sup>6</sup> "A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; \* \* \* a broadcast license is a public trust subject to termination for breach of duty." *Office of Communication of the United Church of Christ v. FCC*, 359 F. 2d 994, 1003 (D.C. Cir. 1966).

<sup>7</sup> Petitioner's reliance on a broadcast licensee's "legitimate renewal expectancies" (Pet. 15) as a demonstration of why a stricter standard of proof should apply in renewal application proceedings begs the question because, as this Court had held, any such renewal

In view of the nature of a renewal proceeding, the application of a "clear and convincing evidence" standard would be inappropriate and contrary to governing statutes.<sup>8</sup> The cases relied on by petitioner (Pet. 11-13) have adopted such a standard only in circumstances in which the government had initiated a proceeding to deprive an individual of valuable and protected liberty or property interests.<sup>9</sup>

expectations derive from "meritorious service," which the applicant must satisfactorily demonstrate to the Commission. *FCC v. National Citizens Commission for Broadcasting*, 436 U.S. 775, 782 n.5 (1978).

<sup>8</sup> The traditional standard of proof in an administrative proceeding is the "preponderance of [the] evidence" standard. See 9 J. Wigmore, *Evidence* §2498 (3d ed. 1940); *McCormick on Evidence* §§339, 355 (2d ed. E. Cleary 1972); *Collins Securities Corp. v. SEC*, 562 F. 2d 820, 823 (D.C. Cir. 1977). The Commission has stated that "preponderance of the evidence" is the standard it applies in broadcast license proceedings. *Sea Island Broadcasting Corp.*, 44 Rad. Reg. 2d (P&F) 1265 (1978), appeal filed *sub nom. Sea Island Broadcasting Corp. v. FCC*, No. 76-1735 (D.C. Cir. Aug. 12, 1976).

The legislative history of the Administrative Procedure Act indicates that Congress contemplated that the traditional "preponderance of the evidence" standard would be the standard of proof to be applied in administrative proceedings generally:

[W]here a party having the burden of proceeding has come forward with a prima facie and substantial case, he will prevail unless his evidence is discredited or rebutted. In any case the agency must decide "in accordance with the evidence." Where there is evidence pro and con, the agency must weigh it and decide in accordance with the preponderance.

H.R. Rep. No. 1980, 79th Cong., 2d Sess. 37 (1946), reprinted in S. Doc. No. 248, *Administrative Procedure Act—Legislative History*, 79th Cong., 2d Sess. 271 (1946).

<sup>9</sup> Both *Collins Securities Corp. v. SEC*, *supra*, and *Nassar and Co. v. SEC*, 566 F. 2d 790 (D.C. Cir. 1977), upon which petitioner primarily relies, involved revocation of SEC registrations and expulsion from the National Association of Securities Dealers, Inc. Unlike broadcast licensees, the investment brokers in *Collins* and *Nassar* had not been granted the exclusive right to use a valuable public resource for a limited period. Moreover, the Communications Act makes clear that broadcast licensees have no rights beyond the

2. The court of appeals correctly held that "courts ordinarily accord the Commission particular discretion in fashioning remedies to maximize compliance with Commission policy" (Pet. App. 8a). See *FCC v. WOKO, Inc.*, 329 U.S. 223, 227-228 (1946); *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 186-189 (1973). Neither the opinion of the court of appeals nor the decision of the Commission in this case reflects what petitioner characterizes as a "new 'standard of no standard,'" (Pet. 23), in which the agency has "unbridled discretion in dealing with its licensees" (*ibid.*). The Commission's decision makes clear that it carefully considered its action in denying petitioner's license renewal application in light of action it had taken in other cases involving similar types of misconduct and, where differences existed, it explained the basis for its different conclusions. See Pet. App. 23a-26a, 32a-34a.<sup>10</sup> The basis

three-year term of the license and no property interests in the license. Similarly, in *Woodby v. INS*, 385 U.S. 276 (1966), the Court held that the "drastic deprivations that may follow" when a resident of this country is deported are so severe as to require a higher standard of proof than the preponderance standard. *Id.* at 285. That standard does not apply in every case in which a party claims a subjective expectation of enjoying a prerogative conferred by the government.

<sup>10</sup>Cases decided by the Commission subsequent to its denial of petitioner's renewal application, upon which petitioner relies to demonstrate a continuing pattern of arbitrary action by the Commission (Pet. 19-20), are, on their face, readily distinguishable. In *Microband Corp.*, 44 Rad. Reg. 2d (P&F) 1490, 1494 (1978), which involved an application for common carrier facilities, the Commission pointed out that the misconduct of a principal owner of the applicant had been unrelated to any FCC-licensed activities and the inaccurate statements made in filing documents with the Commission had been the result of negligence rather than an intention to mislead or conceal facts from the Commission. The instant case involved the use of FCC-licensed broadcast facilities for fraudulent purposes and the making of misrepresentations to the Commission that were "clearly designed to conceal its operating practices \* \* \*" (Pet. App. 31a). *CBS, Inc.*, 69 F.C.C. 2d 1082 (1978), involved misconduct by a television network and network personnel that was not directly related to any individual station owned by the

for the Commission's decision in this case was thoroughly articulated, and the determination to deny the license renewal application was well within its discretion.<sup>11</sup>

network. Moreover, the incident was an isolated one involving the presentation of four professional tennis matches (see *CBS, Inc.*, 67 F.C.C. 2d 969 (1978)), and it did not result from a deliberate policy adopted by the licensee and integral to its operations, as was the case with petitioner. *Tupelo Broadcasting Co.*, 67 F.C.C. 2d 1358, 1366-1368 (1978), similarly involved isolated misconduct that did not result from a deliberate policy adopted by the licensee. Moreover, there was no question of misrepresentation to the Commission in the *Tupelo* case. In *Empire Broadcasting Corp.*, 63 F.C.C. 2d 634 (1977), the Commission found no facts to implicate principals or corporate officers in the misconduct and, as in *Tupelo*, there was no finding of misrepresentation to the Commission. In the *CBS, Tupelo* and *Empire* cases, the Commission granted short-term license renewals, which reflects that the Commission drew a rational distinction between the misconduct in those cases and the substantially more significant misconduct in petitioner's case.

In contemporaneous and subsequent cases involving serious licensee misconduct similar to petitioner's, the FCC has treated the applicants just as it treated petitioner, by denying their license renewal applications. See, e.g., *Eastminster Broadcasting Corp.*, 58 F.C.C. 2d 24 (1976), *aff'd sub nom. Eastminster Broadcasting Corp. v. FCC*, 559 F. 2d 187 (D.C. Cir. 1977); *White Mountain Broadcasting Co.*, 60 F.C.C. 2d 342, reconsideration denied, 61 F.C.C. 2d 472 (1976), *aff'd White Mountain Broadcasting Co. v. FCC*, No. 76-2009 (D.C. Cir. Apr. 9, 1979); *Monroe Broadcasters, Inc.*, 60 F.C.C. 2d 692, reconsideration denied, 61 F.C.C. 2d 716 (1976); *WLLE, Inc.*, 65 F.C.C. 2d 774 (1977), *aff'd sub nom. WLLE, Inc. v. FCC*, No. 77-1787 (D.C. Cir. Jan. 23, 1979); *Berlin Communications, Inc.*, 68 F.C.C. 2d 923 (1978), reconsideration denied, F.C.C. 78-703 (Oct. 4, 1978), appeal filed *sub nom. Berlin Communications, Inc. v. FCC*, No. 78-2048 (D.C. Cir. Oct. 25, 1978).

<sup>11</sup>Petitioner improperly relies on *Arthur Lipper Corp. v. SEC*, 547 F. 2d 171 (2d Cir. 1976), cert. denied, 434 U.S. 1009 (1978), to demonstrate a conflict between the Second Circuit and the District of Columbia Circuit. As we have shown above, Congress has adopted substantially different regulatory schemes for SEC regulation of investment brokers and FCC regulation of broadcast stations. Moreover, the *Lipper* decision holds that an agency's discretionary choice of sanctions is subject to review for abuse of discretion and that under the special circumstances of that case, the SEC had abused

3. Petitioner's contention (Pet. 28-33) that a premature "leak" to the press of the Commission's decision to deny renewal of the license destroyed the integrity of the administrative proceeding is without merit. The "leak" occurred only after a lengthy evidentiary hearing, after the decision of the administrative law judge denying the renewal of the license destroyed the integrity of the representation grounds, after briefs on appeal had been filed with the Commission, after oral argument had been presented to the Commission, and after the Commission had instructed its staff to prepare an opinion denying the renewal of petitioner's license (Pet. App. 144a). The Commission noted that petitioner had failed to show how it had been prejudiced by the "leak" (Pet. App. 145a) and concluded (Pet. App. 146a) that

unauthorized publicity cannot be the basis, without more, for upsetting a decision regularly arrived at, following procedures substantively and procedurally adequate to determine the facts and the law relevant to the resolution of the case.

The court of appeals agreed and stated that although premature revelation of a decision is unfortunate, it could not identify any infringement of due process resulting from the disclosure in this case (Pet. App. 6a).

Petitioner's general exposition of the possible adverse effects of premature disclosure (Pet. 28-33) provides, at most, a basis to conclude that pre-decisional secrecy is a preferable policy for a decisionmaking body to adopt. Petitioner fails, however, to demonstrate that any disclosure prior to publication of the final agency decision—whether deliberate or unintentional—so impairs

its discretion. See 547 F. 2d at 183-185. That holding is in no respect inconsistent with the decision of the District of Columbia Circuit in this case that "courts ordinarily accord the Commission particular discretion in fashioning remedies to maximize compliance with Commission policy" (Pet. App. 8a).

the integrity of the proceeding as to require reversal. The case law, moreover, is contrary to petitioner's position, particularly in light of its failure to show more specifically how the "leak" here caused it to be injured.<sup>12</sup>

4. Finally, petitioner contends (Pet. 33-37) that the court of appeals erred in overturning the Commission's conclusions with respect to Valley's financial qualifications. Although we believe the court's decision was in error in this respect, the ruling on this issue does not raise any question of law of sufficient importance to call for this Court's review. The court of appeals simply found insufficient evidence in the record to support the Commission's findings that Valley's financial qualifications were adequate under the governing legal standard. That finding does not significantly affect petitioner's rights, and it will not have a significant effect on the administration of the Communications Act.

<sup>12</sup>*Eastern Air Lines, Inc. v. CAB*, 271 F. 2d 752, 757-758 (2d Cir. 1959), cert. denied, 362 U.S. 970 (1960), held that release of a press notice announcing the Board's tentative decision, followed six months later by the actual decision, did not reflect an improper prejudgment nor prejudice the right to a fair hearing. See *FTC v. Cinderella Career and Finishing Schools, Inc.*, 404 F. 2d 1308, 1323 (D.C. Cir. 1968) (Robinson, J., concurring) (footnotes omitted): "While occasionally, on particular facts, a predecisional release has been criticized for the outside appearance it created, no case seems to reflect the view that the practice works a deprivation of due process, and the few cases addressing the question have held that it does not." See also *N. Sims Organ & Co. v. SEC*, 293 F. 2d 78, 81 (2d Cir. 1961), cert. denied, 368 U.S. 968 (1962).

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

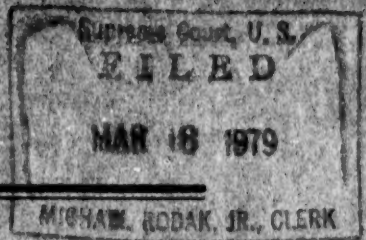
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APRIL 1979



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IN THE  
**SUPREME COURT OF THE UNITED STATES**  
OCTOBER TERM, 1978

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No. 78-1222

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**WESTERN COMMUNICATIONS, INC.,**

*Petitioner,*

*v.*

**FEDERAL COMMUNICATIONS COMMISSION and  
LAS VEGAS VALLEY BROADCASTING CO.,**

*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**BRIEF FOR THE RESPONDENT  
LAS VEGAS VALLEY BROADCASTING CO.  
IN OPPOSITION**

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March 8, 1979

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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1222

WESTERN COMMUNICATIONS, INC.,

*Petitioner,*

*v.*

FEDERAL COMMUNICATIONS COMMISSION and  
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ON PETITION FOR A WRIT OF CERTIORARI TO  
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BRIEF FOR THE RESPONDENT  
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IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, is reprinted in Petitioner's Appendix, pp. 1a-16a. The opinion of the Federal Communications Commission is reported at 59 FCC2d 1441 (1976), and appears in Petitioner's Appendix, pp. 17a-54a; recon.

denied, 61 FCC2d 974 (1976), reprinted in Petitioner's Appendix, pp. 55a-61a. The Initial Decision of the Administrative Law Judge ("ALJ") is reported at 59 FCC2d 1463 and is found in Petitioner's Appendix, pp. 62a-142a. Other relevant orders are found in Petitioner's Appendix, pp. 143a-156a.

### JURISDICTION

The judgment of the Court of Appeals was entered on October 26, 1978. Western's petition for rehearing and suggestion for rehearing en banc was denied December 29, 1978, Petitioner's Appendix ("Pet. App.") pp. 157a-158a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

### QUESTIONS PRESENTED

1. Whether there is sufficient evidence of record to support the Court of Appeals' affirmance of the decision of the Federal Communications Commission denying Western's renewal application because of extensive and flagrant fraudulent billing practices and deliberate misrepresentations to the Commission which were designed to conceal its fraudulent operating practices from the Commission.

2. Whether the Court of Appeals properly exercised its function of judicial review of an administrative action in (1) determining that there was insufficient evidence in the record to support the Commission's finding as to the adequacy of Valley's bank letter under applicable law and policy and (2) by remanding the case to the Commission for review of Valley's overall financial qualifications.

### STATUTES AND RULES INVOLVED

Relevant provisions of the Communications Act of 1934, the Administrative Procedure Act, as amended, and pertinent Rules and Regulations of the Federal Communications Commission are found in Petitioner's Appendix, pp. 159a-165a.

### STATEMENT

In 1971, Western Communications, Inc. ("Western"), an incumbent licensee of KORK-TV, applied for renewal of its television broadcast license for Channel 3, Las Vegas, Nevada. The station is affiliated with the NBC network. Las Vegas Valley Broadcasting Co. filed a competing application for a construction permit for a new television broadcast station to operate on the same channel. The mutually-exclusive applications were set for hearing in 1972.

In 1976, following lengthy proceedings, the Commission found that Western's extensive and protracted fraud in station operations plus its deliberate misrepresentations to the Commission designed to cover-up its dishonest practices compelled the denial of its renewal application. The Commission, on the other hand, found that Valley had "established its qualifications to be a Commission licensee in all respects except its financial qualifications." (Pet. App. 45a) On consolidated appeals, the Court of Appeals affirmed the Commission's order as to Western but remanded Valley's application to the Commission for review of its overall financial qualifications.

Western is a wholly-owned subsidiary of Donrey, Inc., of which Donald W. Reynolds, Sr., is the sole stockholder as well as President and a Director. Channel

3, Las Vegas, is only one of numerous media outlets owned and controlled by Reynolds Sr. Reynolds' extensive media holdings, including a number of other television and radio stations, the largest newspaper in Las Vegas, many other daily and weekly papers, outdoor advertising companies, and CATV interests, etc., were detailed by the Administrative Law Judge and appear in Petitioner's Appendix, pp. 100a-103a. His son, Donald W. Reynolds, Jr., was supervisor over all his broadcast properties during pertinent times involved in the proceedings at the Commission.

#### **Fraudulent Billing**

Western's contract with NBC required it to carry all network commercials and specifically forbade any deletions of network programs without prior consent. Weekly reports to NBC were required which certified that each network program including commercial messages and credits was telecast in its entirety except for those specifically listed on the report form. Western's compensation by NBC was based on its broadcast of network commercials.

Edward R. Tabor and Robert N. Ordonez, general managers of KORK-TV during the license period pertinent herein, as officers and directors of Western, undertook a course of action in direct violation of the network contract and the Rule of the Commission applicable to misrepresentation of the quantity of advertising actually broadcast.

In substance, Western, as a matter of policy and general practice, deleted (clipped) portions of network transmissions including network commercials in order to telecast more local commercials than it could otherwise sell and carry. It did not report the deletion of the

network commercials to NBC on its certified reporting forms.<sup>1</sup> Thus, it collected from the network for the omitted advertising as well as from the local advertiser.

Western conceded the "clipping" practices but contended that it only clipped what it termed "clutter." It was found, however, that the "clipping of network commercials was a common occurrence." (Pet. App. 133a) This fraudulent practice was properly characterized by the Commission as "protracted and flagrant" as well as "extensive and egregious." (Pet. App. 25a-26a)

Western's deletion of network commercials was confirmed not only by evidence submitted by the Broadcast Bureau of the FCC and by Valley's more extensive analysis but also by Western's own study which indicated the clipping of approximately 800 commercials for which Western made restitution to NBC after the close of the record. (Pet. App. 21a-22a; Court of Appeals Joint App. 1310-1339)

Joining network programs late, leaving them early and extending mid-program breaks in order to run all pre-scheduled local commercials was shown to be a regular KORK-TV practice. A special study submitted by Valley limited to only 28 weeks of the pertinent license renewal period established over 500 occasions when KORK left network programs early, 200 other late joinings of network programs and over 500 mid-break extensions. (Pet. App. 70a-71a) A more confined analysis by the Broadcast Bureau revealed 41 occasions of late joining of network programs ranging from 7 to 30 seconds and 14 occasions of mid-program break extensions from 20 to 50 seconds. (Pet. App. 70a-71a)

<sup>1</sup>"None of the station reports indicated any deletions from the network feed." (Pet. App. 22a)

None of these omissions were reported by KORK to NBC on its regular weekly reporting forms on which its compensation by the network was based.<sup>2</sup>

### Misrepresentation to the Commission

The practice of clipping network transmissions in order to squeeze in or "overload" local advertising material was particularly egregious in the 1970 World Series broadcasts, prompting an irate fan to bitterly complain to the F.C.C. concerning the interference of the network telecasts of the ball games by local commercials. The Commission called upon KORK-TV (Western) for a complete and honest explanation of all the circumstances surrounding the allegations of the complaint. This inquiry and three subsequent ones in ensuing months were met by responses from Western which were analyzed at length by the Administrative Law Judge (Pet. App. 73a-83a) and by the Commission (Pet. App. 26a-32a) and found to be patently false and misleading and clearly designed to conceal its operating practices from the Commission. (Pet. App. 31a)

### Valley's Bank Loan Commitment

Valley's application turned principally upon its ability to secure a bank loan with "reasonable assurance." In conjunction with its original application for a construction permit, filed September 1, 1971, Valley submitted a bank commitment letter, dated August 23, 1971, from Nevada State Bank, Las Vegas, Nevada.

<sup>2</sup>Two extended periods of time when the station was completely off the air for 17 minutes and 45 seconds and for 50 minutes were even omitted from the network reports (Pet. App. 23a).

(Pet. App. 88a-91a) This letter was amended by a letter from the Bank's counsel dated February 22, 1973, changing certain conditions relative to the loan because of Valley's subsequent intention to lease both its land and buildings and to purchase its broadcast equipment from RCA on credit. (Ibid.) In his letter, Bank counsel explicitly stated: "On behalf of the Bank I am authorized to confirm that at no time has the Bank withdrawn its letter of August 23, 1971 to Valley and that the Bank remains willing to make the loan pursuant to the terms stated in said letter." The certain changes in the terms of the agreement included (1) approval of the personal financial statements of Valley's stockholders, each of whom would guarantee payment of the loan; (2) Bank to have right of first refusal on future borrowings by Valley during the 5-year term of the loan; (3) Valley to maintain all its bank accounts exclusively at the Bank; (4) explanation of what was intended by the expression "unimproved capital;" (5) agreement extended to January 1, 1975. Valley expressly agreed to these terms and its shareholders indicated that at all times they stood ready, willing and able to comply with the Bank's requirements.

Inasmuch as the question of collateral under the revised terms of the Bank commitment became a matter of special concern to the ALJ, certain interrogatories were authorized to be propounded to the Bank's president.<sup>3</sup> In substance, the Bank's president stated that the Bank was fully aware that Valley would be unable to pledge as collateral either the RCA technical

<sup>3</sup>The full text of the eleven interrogatories together with answers are set forth in the Initial Decision at paragraph 64. (Pet. App. 91a-94a) The more relevant ones, i.e., Nos. 9, 10 and 11 are found in the lower Court's opinion. (Pet. App. 13a)

equipment or any land or buildings but, nevertheless, the Bank was prepared to make its proposed loan of \$1 million as set forth in the 1971 letter subject to a normal routine bank reservation. The final interrogatory, No. 11, and its answer read as follows:

"11. In addition to the personal guarantee by Valley's stockholders, what is the minimum value of collateral that the bank will require in order to loan Valley up to \$1,000,000 as proposed?

"Answer: It will depend upon the conditions at the time the loan is required."

This answer became the basis on which the ALJ and the Commission rested the adverse finding that Valley had failed to demonstrate that it had "reasonable assurance" that the bank loan would eventually be forthcoming. The Court below thoroughly canvassed the record evidence on the bank letter issue and found insufficient support for the Commission's adverse conclusion stating that: "We find insufficient support for the Commission's finding that its [Valley's] bank letter did not meet the reasonable assurance standard, and remand for review of its general financial qualifications." (Pet. App. 10a-11a)

#### Site Access

Valley proposed to locate its transmitter on a federally-owned mountain site near Las Vegas which is controlled by the Interior Department's Bureau of Land Management (BLM). Access to the site is via two private roads, the first and longer one owned by Bell Telephone which agreed to allow Valley to use the road at an annual charge of \$2,000. The second road is owned by Alta Development Co., a company in which Western holds equal shares with Summa Corporation.

Western refused a right-of-way to Valley over this road except on the basis of compensating in full Western's alleged share of the cost of the road's construction and maintenance costs which Western kept raising until the last figure (destined to rise) was \$190,000. The Bureau of Land Management indicated that in the event Valley were awarded a construction permit by the F.C.C. it would issue a permit to Valley to use the transmitter site and the Alta access road. However, the policy of the BLM is not to intervene in disputes between original and later permittees as to terms for use of facilities constructed by the original permittee. In early 1973 when Western's estimated demand was \$45,000 Valley budgeted \$100,000 to purchase the right-of-way. However, the impossibility of firm negotiations with an obdurate Western left the matter in an unresolved state.

The Court of Appeals noting that the Commission had not advised whether "the site access problem, by itself, would warrant a finding of financial disqualification" indicated that this issue could be considered and resolved as part of the Commission's examination of "Valley's complete financial qualifications." (Pet. app. 15a)

#### "Leak" to the Trade Press

In a multiple series of filings following oral argument before the Commission, Western charged procedural irregularities based on an alleged "leak" to the trade press by Commission personnel as to what the Commission had tentatively decided. Importantly, not a single party of interest in the case was implicated in the allegations nor did the charges touch upon or involve in any way the merits of the case. After careful consideration and appropriate investigation the Commission was

unable to find any legitimate basis for re-opening the record or enlarging the issues as Western requested and specifically found that Western suffered no prejudice whatever by reason of events deemed by the Commission to be "most unfortunate" but harmless to the parties. (Pet. App. 44a)<sup>4</sup>

Similarly, the Court of Appeals considered these allegations and properly concluded that it was unable to discern a genuine *ex parte* question stating further "nor can we identify, on this record, any infringement of due process resulting from such disclosure." (Pet. App. 6a)

Upon careful review of the record, the Court of Appeals affirmed the denial of Western's renewal application, holding that there was substantial evidence to support the Commission's adverse findings, and remanded Valley's application for further review of its overall financial qualifications.

#### ARGUMENT

There are no important federal questions presented by the petitioner which would justify the grant of a writ of certiorari. The multiple reasons for granting the writ advanced by Western are, essentially, a re-cycle of

<sup>4</sup>The Commission pointedly noted that Western had flooded the Commission with a barrage of pleadings and unauthorized briefs in such a manner as to "have delayed the ultimate resolution of this proceeding and raise a question concerning counsel's compliance with Section 1.52 of our Rules which provides in pertinent part that their signature on each Western pleading certifies their 'belief there is good ground to support it; and that it is not interposed for delay....' Counsel are advised that further pleadings directed to the alleged *ex parte* violations will be summarily dismissed." (Pet. App. 44a, fn. 21)

those presented to the Commission and again in the Court of Appeals where, in both instances, they were found to be completely without merit.<sup>5</sup>

Despite a sophisticated effort to distill from them a suitable and persuasive reason for the grant of the writ, the absence of any genuine and compelling ground for so doing is apparent on the face of this proceeding. Recourse to the decision of the Court of Appeals, the several Decisions of the Commission and the Initial Decision of the ALJ, all appearing in Petitioner's Appendix, pp. 1a-156a, quickly and affirmatively dispells any notion that Western has been denied due process (procedural or substantive) or has been unjustly denied renewal of a privileged license to utilize the public's airways for its private gain. Rather, Western has enjoyed an abundance of process, has received full and fair consideration of its multiple defenses and arguments, and has successfully prolonged its profitable hold on Channel 3 for almost 8 years beyond its last authorized license period.

Similarly, the remand of Valley's application to the Commission for further proceedings involving "consideration of Valley's complete financial qualifications"

<sup>5</sup>The Court of Appeals summarized the claims as follows: "Western claim[ed] that the Commission's denial of its renewal application (A) was not based on substantial evidence, (B) neglected valid defenses presented on Western's behalf and (C) constituted an unjustifiably harsh sanction of conduct not clearly prohibited under prior commission policy." (Pet. App. 4a) As to Valley's appeal, Western, in substance, challenges the verity of the applicable standard of review as pronounced by this Court in *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951), repeated in others and which was faithfully followed by the Court of Appeals in this case.

(Pet. App. 15a) in no way constitutes a legitimate and persuasive reason for the grant of the extraordinary writ of certiorari.

Western's specious contentions that serious and important federal questions having wide and general application are presented by the decision of the Court of Appeals in respect to (1) Standard Of Proof; (2) Sanction and Defense; (3) Leak to Trade Press; and (4) Remand of Valley's Application For Further Proceedings, are, hereinafter, addressed seriatim.

Preliminarily, however, by way of background it is important to observe that Western proceeds here, as below, on a sordid and sullied record—a record of the elevation of private corporate greed over the basic notions of public trust accompanying the temporary possession of one of the government's most valuable privileges and "scarce resource"—the use of the public airways for private profit. Western's dishonest conduct was so patently revealed upon this record as to constrain a case-hardened, veteran Administrative Law Judge to denounce it as "dishonesty deserving of the utmost censure" pointing out, *inter alia*, that Western's practice of "selling twice what it could only deliver once, and of collecting for its own benefit the proceeds of both sales" was a more aggravated form of fraud than the classic "double billing" offenses normally encountered. (Pet. App. 133a). The Commission was moved unanimously to refer to petitioner's fraudulent billing not only as "protracted and flagrant" but also "extensive and egregious" (Pet. App. 25a-26a); to denominate Western's responses to Commission inquiries as to just what was going on in their station operations as "false, misleading and evasive representations"; and to properly state that these carefully concocted com-

munications "were clearly designed to conceal its operating practices from the Commission." (Pet. App. 31a) These outright blatant misrepresentations designed to mislead the Commission and to conceal the invidious fraudulent practices of Western had previously been found by the ALJ to be "rife with inaccurate and misleading statements" and "contained deliberate misrepresentations" (Pet. App. 133a), thus compelling the conclusion that these assertions were "false and the station's executives knew it when the letters were written." (Ibid.)

In short, it is difficult to postulate a more explicit tapestry of deceit and dishonesty against which the attack upon the judgment of the Court of Appeals by Western must be viewed.

### Standard of Proof

In respect to the standard of proof, there is no important federal question presented on the sullied record of Western's unfaithful trust of a public license in this case.

At the outset, it must be observed that Western implicitly acknowledges that the Court of Appeals correctly reviewed the record in conformity with the requirements of the Administrative Procedure Act and the norm declared by this Court in *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951). The appropriate standard of review, as explicated by the Court of Appeals "requires that the Commission's findings be supported by substantial evidence." (Pet. App. 5a) And, pointedly and properly the Court of Appeals found substantial support in the evidence for the Commission's findings adverse to Western's renewal application.

Western's principal attack on the case against its license renewal, both before the Commission and in the Court of Appeals, charged that it was not supported by "reliable and probative" evidence of a "substantial" character. It now suggests that a different standard of proof should be required in *FCC license renewal cases*, namely, the "clear and convincing" standard presumably required by the Court of Appeals in *SEC license revocation cases* where the charge is completely based on circumstantial evidence and results in a practical deprivation of livelihood. *Collins Securities Corp. v. SEC*, 183 U.S. App. D.C. 301, 562 F.2d 820 (1977); *Nassar and Co. v. SEC*, 185 U.S. App. D.C. 125, 566 F.2d 790 (1977). The inference to be drawn is, presumptively, that the record in this case could not measure up to such a different standard. Western's contention in this regard, however, has no real application to the record in this case and constitutes, largely, an exercise in semantics.

Important distinctions between this case and the SEC cases and other authorities advanced by Western are obvious. First, the instant case involved a license *renewal* proceeding not a license *revocation* as in *Collins* and *Nassar*.

Unlike those cases, here there was *substantial direct* as well as *circumstantial* evidence establishing Western's dereliction of duty.

Further a *radically different type of license* is involved here than in the SEC cases—an FCC license is a temporary, contingent license to use a limited and scarce public resource for private gain thereby conferring a special privilege upon the recipient in the nature of a public trust. The broadcast licensee acquires

no property right in the channel, as made plain by statute (47 U.S.C. Sec. 301).<sup>6</sup>

This Court has unequivocally stated that "licenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them." *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 394 (1969).

The critical differences in license type and classification are cogently explicated in the Report of the Commission in *Sea Island Broadcasting Corp.*, 44 P&F Radio Reg.2d 1265 (1978). There the Commission noted at p. 1267 that: "Broadcasters have a special status as public trustees of a scarce source, namely, the broadcast frequencies. The Supreme Court has noted that because broadcast frequencies are limited, 'they have been necessarily considered a public trust.'" Citing *Red Lion*, *supra*.

Moreover, refusal to renew a broadcast license is not a penalty as definitively laid down by this Court in *F.C.C. v. WOKO, Inc.*, 329 U.S. 223, 228 (1946). Thus,

<sup>6</sup>The Communications Act of 1934 provides in pertinent part: "It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions and periods of the license..." 47 U.S.C. Sec. 301. It further provides that: "No license granted for the operation of a broadcasting station shall be for a longer term than three years... Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses... if the Commission finds that public interest, convenience and necessity would be served thereby..." 47 U.S.C. Section 307(d).

unlike the SEC cases relied upon by Western, a penalty approaching a deprivation of livelihood is not here involved.<sup>7</sup>

The other and additional cases advanced by Western on standard of proof deal with (a) deportation, (b) denaturalization, (c) involuntary confinement and the like and are completely inapposite.

In any event, however, unlike the shaky and ambiguous record and dubious circumstantial evidence involved in *Collins* and *Nassar, supra*, the weight and quality of the record proof here left neither the hearing officer nor the reviewers with any substantial doubt as to the justification of the non-renewal decision. Indeed, if morality in broadcasting is to have any meaning, no other conclusion could be reached.

Summary reference to only a few parts of the Commission's Decision and the ALJ's Initial Decision demonstrates the clarity and conviction with which the case for non-renewal was established.

Thus, the Commission clearly stated that "...the logs establish with *reasonable certainty* that KORK-TV was off network for significantly longer periods than authorized and that as a general practice it clipped all or parts of network commercials in order to telecast local advertising...." (Pet. App. 21a) (Emphasis

<sup>7</sup>Western emphasizes the renewal by the Commission of all of Reynold's other broadcast licenses. *Donald W. Reynolds*, 65 FCC2d 451 (1977). Unlike the securities dealers in *Collins* and *Nassar*, Reynolds has suffered no bar to continuing in the broadcast business—no loss of livelihood. This is an important distinguishing fact and one which is wholly inconsistent with the cry of "stigma plus impairment of future employment" resulting to Reynolds as claimed by Western in a fanciful flight from reality. (Pet. 14)

added.) Again, the Commission in unequivocal language found: "*It is clear*, that the alleged failure by Mr. Tabor and Mr. Ordonez to be aware of the fraudulent nature of the network reports establishes a lack of competence and diligence in their supervision over KORK-TV's affairs which contributed to the fraudulent billing and a gross disregard of the Commission's fraudulent billing rules, which reflects adversely on Western's qualifications to be a Commission licensee." (Pet. App. 23a-24a)

Additionally, obvious and clear misrepresentations advanced in Western's own communications to the Commission are meticulously noted in the Commission's Decision as set forth in Petitioner's Appendix, pp. 26a-32a. The referenced evidence is neither obscure nor circumstantial. Rather, it is "clear and convincing" and while this descriptive language was not employed by the Commission in precise talismanic tandem, the quality and quantity of proof of Western's deceptive practices was obviously of a kind to satisfy any such standard.

The Initial Decision of the ALJ likewise demonstrates that the case for Western's falsity in word and deed was beyond cavil. Thus, the Judge found that it was "*apparent* that KORK's policy to clip network 'clutter' was in deliberate violation of the terms of its contract," [with the network] and "*equally apparent* that its failure to report such clipping in its weekly Station Reports rendered those reports into misrepresentations." (Pet. App. 73a-83a; 132a-133a) Again, the Judge found that "KORK's correspondence with the Commission as to its commercial practices was *rife* with inaccurate and misleading statements. The station was deliberately pursuing a policy of scheduling more local commercials during network breaks than could possibly be accommodated." (Pet. App. 132a-133a) (Emphasis

added.) If required, there can be no doubt that the descriptive adjectives "clear and convincing" could be readily and truly applied to the evidence which was "apparent" and "substantial" and "reasonably certain." To carp, as Western so manifestly does on this score, is truly to elevate form over substance which was, of course, clearly obvious to the Court of Appeals.

The plain fact is that the record in this case as to Western was viewed and examined by the Court of Appeals in accord with statutory requirements and the mandate of this Court in *Universal Camera, supra*, and its progeny and found to be fully supportive of the findings and conclusions of the Commission. (Pet. App. 5a-6a) "On the clipping issue, the factual record supports the Commission's conclusion that KORK substituted local material for network broadcasts. . . . There is also substantial evidence in the record that Western's responses to Commission inquiries involved misrepresentations and lacked candor. The F.C.C. opinion carefully traces Western's inaccurate characterizations of particular incidents and general practices. . . ." (Id. 5a)

The evidence of clipping or deletion of network commercials leading to fraudulent billing was extensive and convincing and was treated at length both in the Initial Decision of the ALJ (Pet. App. 66a-73a), and in the Decision of the Commission (Pet. App. 19a-26a). There are few FCC cases, if any, revealing a more explicit pattern of fraud and deceit than in the instant one.

The accuracy of the charges of deletion of network commercials set forth in the Bill of Particulars of the Broadcast Bureau was conceded by Western and, during the pendency of the cases before the Commission, it compensated NBC for them. (Pet. App. 21a)

A more extensive study by Valley, covering only 1 week in each of 28 months of Western's programming, clearly established that all or part of 250 network commercials were deleted thus conclusively indicating that clipping of network commercials was not a random sometime thing but "a common occurrence" and a regular and frequent practice (Pet. App. 69a-70a), a practice deliberately built into the station policy by its managers both of whom were Western corporate officers.<sup>8</sup>

Western's own analysis substantially confirmed the accuracy of this clear and convincing evidence and moved it, in a burst of belated "contrition," to proffer NBC more than \$7 thousand for network commercials billed to NBC but not carried by the station. (Pet. App. 71a-22a)

Moreover, as to the issue of misrepresentation and lack of candor, the record disclosed that on four separate occasions in 1970-1971 the Commission, acting on complaints of the viewing public regarding intrusion of local commercials upon network programs, specifically inquired of Western just what was occurring at the station in this respect. In light of the admitted practices of Western in overloading network breaks with local

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<sup>8</sup>The painstaking investigation and assembly of documentary evidence through comparison of station logs presented a burdensome challenge not only because of time restrictions but also the sheer enormity of the task. Thus, Valley's indepth investigation and subsequent evidence covered the documents for only 1 week per month for 28 months of the 36 month license period. Western claimed that its station records for the other 8 months were destroyed in a fire at the station in March 1972. The daily and weekly pattern of fraud on a large scale, however, was obvious.

commercials, the responses to these inquiries were, as found by the ALJ and the Commission, "rife with inaccurate and misleading statements" (Pet. App. 133a) designed to conceal the fraudulent practices of the station. The record further discloses, as the Court of Appeals noted, that these investigative inquiries were carefully considered and analyzed by the Commission (Pet. App. 5a; 26a-32a). Likewise, reference to the Initial Decision of the ALJ indicates a conscientious and precise evaluation of them at length (Pet. App. 73a-83a; 132a-133a) leading to the inexorable conclusion that "KORK's subject correspondence contained deliberate misrepresentations to the Commission and was lacking in candor regarding its policies and practices in joining network programs after their beginning, leaving network programs before their end, and extending network station or commercial breaks so as to affect the content of the network programs." (Id. 133a)

Because of the vast scope of its oversight responsibilities and the manifold number of its licensees, the Commission must rely on the candor and good faith of those, like Western, entrusted with the use of a property in the public domain—indeed, it must demand it, *Neighorly Broadcasting Co., Inc.*, 24 RR 959, 967 (1963), and "must refuse to tolerate deliberate misrepresentations." *Nick J. Chaconas*, 28 FCC2d 231 (1971). As this Court has noted, deception or lack of candor in F.C.C. operations constitutes a serious impairment of the public interest and the very fact of concealment may be more significant than the facts concealed or the substance of the false statement. *F.C.C. v. WOKO, Inc.*, *supra*. As the Commission noted, these misleading deceptions, standing alone, would constitute sufficient grounds for rejecting Western as a qualified applicant for continued licensing on the

frequency. And, as the Court of Appeals pointedly noted: "The Commission has held, *and the courts affirmed*, that misrepresentation of even immaterial facts is a valid basis for non-renewal." (Pet. App. 8a) Citing: *F.C.C. v. WOKO, Inc.*, *supra*, at 226-227; *Independent Broadcasting Co. v. F.C.C.*, 193 F.2d 900, 902 (D.C. Cir., 1951), cert. denied, 344 U.S. 837 (1952); *Crowder v. F.C.C.*, 399 F.2d 569 (D.C. Cir.), cert. denied, 393 U.S. 962 (1968). (Emphasis added.)

Finally, as the record in this case to date so eloquently demonstrates, the evidence of Western's illegal avarice and chicanery was clear enough to convince (1) a veteran Administrative Law Judge, wise in the ways of the industry (Pet. App. 62a-142a); (2) a unanimous array of the Commissioners of the Federal Communications Commission (Pet. App. 17a-54a); (3) a unanimous panel of seasoned Circuit Court Justices—a panel with a collective record of 53 years of experience in careful screening of F.C.C. and other agency cases (Pet. App. 1a-16a); and (4) the corporation, Western, itself, which was moved to acknowledge the false billings for network commercials covered in the Bureau's Bill of Particulars and those confirmed by its own study (Pet. App. 21a-22a).

### Defenses and Sanction

Western complains of disparate treatment by the Commission which the Court of Appeals allegedly condoned. Hence, Western asserts that there is an "important federal question" of wide application requiring the intervention of this Court.

To the contrary, there is neither an important federal question presented nor any valid basis for

complaint other than the normal "post-mortem" railings that not infrequently accompany lost litigation.

First, the Commission gave full, attentive, and reasoned consideration to Valley's defenses, fairly compared the record with those cases involving lesser administrative sanctions and adverted to those reasons which compelled an obvious distinction. (Pet. App. 23a-26a) Further, the Court of Appeals undertook the rational, concise consideration which Western's exaggerated claims merited in light of the sordid, sullied record of deliberate fraud and complete lack of candor as disclosed in the misleading and false responses to Commission inquiries. (Pet. App. 6a-8a) There is no ground for complaint here.

Moreover, as to sanctions, the considerable primary discretion accorded the Commission "in fashioning remedies to maximize compliance with Commission policy" has, in the public interest, been the accepted, judicial rule, as cogently noted by the Court of Appeals in rejecting Western's contentions in this respect. (Pet. App. 8a) Citing: *F.C.C. v. WOKO, supra*, at 228; *Greater Boston Television Corp. v. F.C.C.*, 444 F.2d 841, 857 (D.C. Cir., 1970), cert. denied sub nom.; *WHDH, Inc. v. F.C.C.*, 403 U.S. 923 (1971); *Continental Broadcasting, Inc. v. F.C.C.*, 439 F.2d 580, 583 (D.C. Cir.), cert. denied, 403 U.S. 905 (1971); *Lorain Journal Co. v. F.C.C.*, 381 F.2d 824, 831 (D.C. Cir., 1965).

Indeed, the decision of this Court in *F.C.C. v. WOKO, Inc.*, *supra*, is a convincing answer to the unsubstantiated charge of Western here. There a complaint concerning dissimilarity in FCC sanctions was deemed groundless by a unanimous Court with the holding that the Commission is not bound "to deal

with all cases at all times as it has dealt with some that seem comparable." (Id. at 228) Pointing out that "denial of an application for a license . . . is not a penal measure," this Court emphasized the latitude of discretion that must be allowed to the Commission in determining whether "the public interest will be served by renewing the license." Significantly, this Court stated: "... the fact that we might not have made the same determination on the same facts does not warrant a substitution of judicial for administrative discretion since Congress has confided the problem to the latter." (Id. at 229)<sup>9</sup>

In essence, Western's arguments are a repetition of those advanced before the Commission and the Court of Appeals and found to be without merit. The strained effort to dress them in a fashion hopefully to satisfy the requirements for certiorari is singularly unavailing. As noted *supra*, they have been carefully and fairly considered and properly rejected. The credibility of witnesses advancing so-called mitigating defenses is, in the first instance the function of the ALJ as the hearing officer, and, ultimately, the Commission. Dissatisfaction with their judgments with respect to crediting such testimony and evidence constitutes no basis for the intervention of this Court.

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<sup>9</sup>The principle of agency discretion in choosing sanctions has been reiterated by this Court more recently in *Butz v. Glover Livestock Commission*, 411 U.S. 182 (1973). See also: *American Power and Light Co. v. SEC*, 329 U.S. 90, 112-113 (1946); 4 K. Davis, *Treatise on Administrative Law*, Sec. 30.10 at 250-251 (1958).

### Leak to Trade Press

Western's allegation that a premature "leak" to the trade press of the tentative decision of the Commission following the close or oral argument deprived it of due process, in some vague and undefined manner, was thoroughly considered and investigated by the Commission and found to be without merit. (Pet. App. 143a-156a)

Importantly, none of the parties to the proceeding were involved in the allegations nor did the charged conduct touch upon the merits of the case. After careful and reasoned consideration, the Commission found that the substantive matters involved in Western's allegations pertained wholly to the internal procedures of the Commission and failed to establish a "basis for finding that the leaks involved bias or prejudice, indicated prejudgment of the merits of this proceeding, or that additional hearings would do anything more than delay the proceeding, without any likelihood of altering the outcome." *In re Western Communications, Inc., et al.*, 61 FCC2d 974, 975 (1976).

Western's cry of "ex parte," considerably muted if not completely abandoned in this Court,<sup>10</sup> was completely inapposite and without foundation as noted by the Court of Appeals (Pet. App. 6a).

The incident of a temporary lapse in the internal functions of the Commission is closely akin to the press leak of a confidential decision of this Court cited by Western in the Court below. There, this Court denied permission to petitioners to file a supplemental memorandum directed to the alleged impact of the news leak

<sup>10</sup>"Western does not claim that any leak is reversible error." (Pet. Brief, p. 32)

on the rights of the petitioners. No. 76-793, *Erlichman v. U.S.*; No. 76-1081, *Mitchell v. U.S.*, 45 L.W. 3718 (April 28, 1977). Subsequently, this Court denied certiorari without comment on the purported claim of prejudice arising from the premature disclosure to the press. *United States v. Haldeman, et al.*, 431 U.S. 933, 97 S. Ct. 2641 (1977).

Western's contention that "thoughtful consideration of the evidence" was *prima facie* precluded because of the short lapse of time between oral argument and tentative decision is completely at variance with the rubrics of normal agency proceedings. The entire record and the briefs of the parties were before the Commission for review and study for a substantial length of time prior to oral argument, at which, of course, there is no presentation of evidence.<sup>11</sup> Presumably, the Commission—like an appellate court—is familiar with the record and issues involved in the oral argument. Here, the palpable indictment of Western's fraudulent conduct by the overwhelming evidence of record, including its own concession of deleting network transmissions including commercial content, the documented evidence of Western's deliberate misrepresentations and lack of candor in response to Commission inquiries, left little, if any, room for debate or doubt as to its complete lack of requisite qualifications for renewal of its license.

<sup>11</sup>Briefs in this proceeding were filed with the Commission December 2, 1974. Oral Argument was heard by the Commission March 9, 1976.

### Remand of Valley's Application

In seeking review of the decision of the court of appeals as it relates to Valley's appeal which centered on the adequacy of Valley's bank letter, Western is patently laboring under a misapprehension. Western incorrectly claims (Pet., p. 33) that the court below undertook extensive *de novo* review of the record in Valley's appeal and then substituted its judgment for that of the Commission on Valley's financial qualifications. Western further claims incorrectly that the Court of Appeals exceeded the bounds of judicial review prescribed by the Administrative Procedure Act, proceeded in conflict with decisions of this Court, and jeopardized a fundamental statutory prerequisite of broadcast licensing.

The record clearly shows that the court of appeals reviewed the entire record pursuant to the applicable requirements of the Administrative Procedure Act, 5 U.S.C. Section 76 and the mandate of this Court. As to Valley's bank letter, it was unable to find the required evidence necessary to support the "substantial evidence" requirement of the Administrative Procedure Act. Being thus unable to find this "substantial evidence" the court of appeals had no choice but to reverse the Commission's decision as it relates to Valley's bank letter.

Western likewise misconstrues the thrust of the cases it cites as support for its incorrect argument that the court of appeals was obligated to uphold the Commission's decision. In both cases cited by Western, *Atlantic Refining Co. v. F.T.C.*, 381 U.S. 357 (1965) and *S.E.C. v. New England Electric System*, 390 U.S. 207 (1968), this court clearly stated that decisions of regulatory agencies should be affirmed if the decision has "warrant

in the record" or is "adequately supported in the record." In the instant case, that key factor was totally lacking as to Valley's bank letter. As the court of appeals stated (Pet. App. 10a):

"We find insufficient support for the Commission's finding that its (Valley's) bank letter did not meet the reasonable assurance standard. . . ."

In support of its incorrect argument that the court below exceeded the proper scope of its judicial review, Western cites *F.C.C. v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978); *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc.*, 435 U.S. 519 (1978) and *Mobil Oil Corp. v. F.T.C.* 417 U.S. 283 (1974). What Western fails to comprehend is that its so-called scope of review is not applicable to the instant case. *F.C.C. v. National Citizens Committee for Broadcasting* and *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc.*, *supra*, both deal with rulemaking procedures of Government agencies. A different standard is applied in such agency rulemaking cases as this Court noted in *F.C.C. v. National Citizens Commission for Broadcasting*, *supra*, wherein it stated (at p. 801):

"We agree with the Court of Appeals that regulations promulgated after informal rulemaking, while not subject to review under the 'substantial evidence' test of APA, 5 U.S.C. §706(2)(E), quoted in n. 21, *supra*, may be invalidated by a reviewing court under the 'arbitrary or capricious' standard if they are not rational and based on consideration of the relevant factors. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413-416, S.Ct. 814, 822-823, 28 L.Ed.2d 136 (1971)."

In the instant adjudicatory case the Court below correctly applied the "substantial evidence" test. It was unable to find the necessary "substantial evidence" as to the bank letter and had no choice but to reverse the Commission.

*Mobil Oil Corp. v. F.C.C.*, *supra*, is likewise inapposite. In *Mobil* this Court affirmed a decision of the Court of Appeals for the Fifth Circuit, which decision had affirmed an Order of the Federal Power Commission. This Court stated that the action of the court of appeals in that case was an appropriate exercise of administrative discretion *supported by substantial evidence in the record as a whole*. Again, the key factor of substantial evidence in the record is lacking in the instant case to support the Commission's adverse findings as to the bank letter.

There is no question that the court below correctly followed the procedures outlined in the Administrative Procedure Act, 5 U.S.C. §706(1)(E) applicable to this type of case. The court likewise adhered to the mandate of this Court delineated in its decisions in cases properly applicable to the instant case. [See *Universal Camera Corp. v. N.L.R.B.*, *supra*, and *Beth Israel Hospital v. N.L.R.B.*, 437 U.S. —, 98 S.Ct. 3463 (1978)]. As required by the Act and the decisions of this Court, the court below, in applying the required "substantial evidence" test, canvassed the record to determine whether the evidence relied upon by the Commission provided the requisite substantial support. The record did not support the Commission's finding. The Court had no choice but to remand.

The correct procedure to be followed by the reviewing courts in cases such as this was clearly spelled out by this Court in *Universal Camera Corp. v. N.L.R.B.*,

*supra*, and recently reiterated in *Beth Israel Hospital v. N.L.R.B.*, *supra*. In *Universal Camera*, *supra*, this Court went to great lengths in tracing the Congressional intent and the legislative history of the Administrative Procedures Act as it applies to the scope of judicial review. It pointed out that the Court of Appeals was not completely bound by decisions of Federal agencies. The intent of Congress was made quite clear as to the scope of review required by the Court of Appeals in dealing with the review of decisions of Federal agencies such as the National Labor Relations Board. This Court noted (at 466):

"Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence of both."

In the instant case the Court of Appeals properly exercised its conventional judicial function. It took the affirmative action required by both the Administrative Procedures Act and the decisions of this Court. While affording full respect to the Commission's findings, it reviewed the record and found lacking the substantial

evidence necessary to support the Commission's findings.

Western finally and incorrectly contends that the Court of Appeals usurped the FCC's statutory role (in determining financial qualifications of broadcast applicants by "...judicial bending of long-standing FCC qualifications standards..."). This claim is completely inaccurate as reflected in the court of appeals opinion. The court merely stated that the bank letter of Valley met the "reasonable assurance" standard of the Commission and stated further (Pet. App. 15a):

"We do not foreclose Commission consideration of Valley's complete financial qualifications."

The Court of Appeals in no way has usurped the Federal Communications Commission's statutory role in determining licensee qualifications.

#### CONCLUSION

There is, therefore, no substantial reason for this Court to grant the petition for certiorari and, accordingly, it should be denied.

Respectfully submitted,

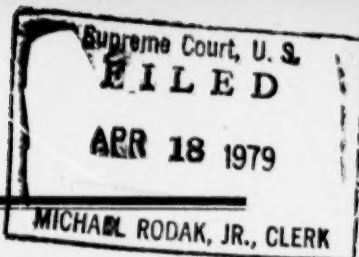
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March 8, 1979

No. 78-1222



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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1978

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WESTERN COMMUNICATIONS, INC., *Petitioner,*

*v.*

FEDERAL COMMUNICATIONS COMMISSION AND  
LAS VEGAS VALLEY BROADCASTING Co., *Respondents.*

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On Petition For Writ Of Certiorari To The United States  
Court of Appeals For The District of Columbia Circuit

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**PETITIONER'S REPLY TO BRIEFS IN OPPOSITION**

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April 18, 1979

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1978

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No. 78-1222

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WESTERN COMMUNICATIONS, INC., *Petitioner,*

*v.*

FEDERAL COMMUNICATIONS COMMISSION AND  
LAS VEGAS VALLEY BROADCASTING CO., *Respondents.*

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On Petition For Writ Of Certiorari To The United States  
Court of Appeals For The District of Columbia Circuit

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**PETITIONER'S REPLY TO BRIEFS IN OPPOSITION**

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In their briefs in opposition to the Petition for Writ of Certiorari, neither the FCC nor Valley has overcome Petitioner's showing that there are multiple reasons for granting the writ.

1. There is an important Federal question presented as to the duty of Courts of Appeals to require administrative agencies to provide rational explanations for disparate treatment in comparable cases. The error of the Court of Appeals here may not be avoided by re-

liance in the briefs in opposition on agency reasons that the Court of Appeals never considered or by other *post hoc* rationalizations of the record or the precedents. Nor do asserted differences between the nature of FCC and SEC regulation eliminate the evident conflict between the District of Columbia and Second Circuits on this question.

As to sanctions, the issue is not whether agencies generally have discretion in choosing them (FCC Br. 8-10; V. Br. 22-23), but whether in this case there was adequate judicial review, as required by *Melody Music, Inc. v. FCC*, 120 U.S. App. D.C. 241, 345 F.2d 730 (1965), to prevent agency abuse of its discretion. The failure of the Court of Appeals to engage in meaningful review in this case—even failing to address or to cite Petitioner’s reliance on *Melody Music*—has been highlighted by the District of Columbia Circuit’s decision only last week, in another FCC license renewal case, which expressly reaffirmed the *Melody Music* doctrine “as sound.” *White Mountain Broadcasting Co. v. FCC*, No. 76-2009, slip op. at 9 (D.C. Cir. April 9, 1979). *White Mountain* reiterated that a reviewing court must require the FCC to explain disparate treatment unless the differences in the misconduct at issue are “so obvious as to remove the need for explanation.” *Id.*, quoting *Melody Music*. If the FCC seeks to rely on factual differences, the court must require the agency to explain “the relevance of the differences to the Commission’s purposes and those of the Federal Communications Act.” *Id.* at 8. The Court of Appeals did not follow or apply these fundamental principles in the instant case.

That the FCC had claimed in its decision that factual differences justified different treatment for Pe-

titioner than that afforded other licensees in similar prior cases (FCC Br. 8-10; V. Br. 22) is beside the point. Particularly in the face of Petitioner’s strong contentions, the Court of Appeals had a duty to determine whether the differences claimed by the FCC were relevant to the agency’s purposes and the Communications Act. It failed to do so. The Court of Appeals did not even purport to rely on the FCC’s explanation of such differences, or to find, as it did in *White Mountain*, that the differences were so “obvious” as not to require explanation.<sup>1</sup> Also inapposite is the claim in the FCC’s brief in opposition that subsequent agency cases are “readily distinguishable” from this case (FCC Br. 8 n.10). Counsel’s *post hoc* rationalizations here are not a substitute for the required meaningful judicial review below to determine whether the differences were so great as to obviate the need for agency explanation.<sup>2</sup>

Most importantly here, the *Melody Music* requirement is not limited to disparate sanctions, but applies to other disparate treatment as well.<sup>3</sup> Therefore, to

<sup>1</sup> Compare also *Barnum v. National Transportation Safety Board*, No. 77-1957 (D.C. Cir. March 14, 1979), where the court took nine slip opinion pages to explain its judicial review of the claim that a 150-day suspension of a commercial pilot certificate was an abuse of agency discretion because similar conduct in other cases had resulted in only 30-day suspensions.

<sup>2</sup> Petitioner invited to the attention of the Court of Appeals various FCC cases decided after Petitioner’s case which were inconsistent with the treatment given Petitioner by the FCC. The Court of Appeals should have required the FCC to square its reasoning in these other cases with its action concerning Petitioner. It did not do so.

<sup>3</sup> E.g., *Public Media Center v. FCC*, — U.S. App. D.C. —, 587 F.2d 1322 (1978); *Columbia Broadcasting System, Inc. v. FCC*, 147 U.S. App. D.C. 175, 454 F.2d 1018 (1971). See also

whatever degree *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946), and *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182 (1973), suggest agency flexibility on sanction, they do not excuse the Court of Appeals' failure to insist that the FCC explain why it did not consider or credit Petitioner's defenses and claims of mitigating factors when these same defenses and factors had been held decisionally significant in other cases, namely (a) reliance on legal counsel, (b) absence of the required element of *scienter* in connection with alleged fraud, (c) restitution, and (d) corrective and preventive action (Pet. 21-22).<sup>4</sup> The Court of Appeals and the briefs in opposition have completely overlooked this second important branch of Petitioner's disparate treatment/*Melody Music* claim.

Analysis shows that the asserted factual differences relied on by the FCC below, but not addressed by the Court of Appeals, either did not exist or had no relevance to the Commission's purposes and those of the Communications Act. For example:

(a). Although the station in *Channel 13 of Las Vegas, Inc.*, 37 F.C.C.2d 518 (1972), may not have clipped "commercials" (Pet. App. 26a), it did clip *other* "advertising" matter. The fraudulent billing rule (Pet. App. 165a) applies to all "advertising" whatever its form, and in *Channel 13* the FCC expressly

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*Atchison, T.&S.F.R. Co. v. Wichita Board of Trade*, 412 U.S. 800, 808 (1973) (plurality opinion): an agency has a "duty to explain its departure from prior norms."

<sup>4</sup> Nothing in the decisions below suggests that witness "credibility" (V. Br. 23) affected rulings on Western's defenses and mitigating factors.

rejected the claimed distinction between "commercials" and *other* "advertising" matter.<sup>5</sup>

(b). *WEAU, Inc.*, 50 F.C.C.2d 659 (1975), cannot be distinguished on the stated ground that "the licensee's principals took immediate steps to eliminate clipping and fraudulent billing on discovery of the wrongdoing," while allegedly Petitioner did not (Pet. App. 26a n.9). The official reports of *WEAU* show that commercial clipping and false bills to NBC were "repeatedly" brought to the attention of the licensee's principals, but they "persistently failed to take any meaningful action," despite specific complaints of *commercial* clipping, until after designation of hearing. 50 F.C.C.2d at 680-82.<sup>6</sup>

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<sup>5</sup> The fraudulent billing in *Channel 13* was more, not less, extensive and egregious than that alleged at KORK-TV. In *Channel 13* at least 27 advertising credits were clipped over a 20-day period, 37 F.C.C.2d at 518; at worst, the *record* evidence suggests KORK-TV overbilled NBC for 21 commercials over a 35-day period. Only nine weekly bills from KORK-TV to NBC during the three-year license period are in the record. While Petitioner has never denied that these reports may have been "inaccurate" (FCC Br. 2 n.1) in failing to disclose clipping of *clutter*, the only "proof" that KORK-TV "overbilled NBC" for *advertising* (*id.*) is based on the highly questionable log comparisons *plus* these few reports. Valley's supposed showing that KORK-TV clipped 250 network commercials (V. Br. 19) is meaningless under the fraudulent billing issue because the record contains no bills to NBC claiming credit for the allegedly missed commercials (Pet. App. 70a).

<sup>6</sup> None of Petitioner's officers, directors, or stockholders knew or believed commercials were being clipped without notice to NBC, there were no complaints of commercial clipping, the second station manager stopped all clipping (even of clutter) promptly after taking over, no further clipping took place, and stringent new controls were established before any FCC investigation or hearing order.

(c). The FCC's claim that fraudulent billing in *Blackstone Broadcasting Corp.*, 52 F.C.C.2d 1106 (1975), was "limited [in] scope," while Western's was "protracted and flagrant" (Pet. App. 25a) does not withstand scrutiny. The record in *Blackstone* involved more than 45 false invoices over more than *six years*, 52 F.C.C.2d at 1117; the record here suggests no more than nine erroneous NBC bills in three years.<sup>7</sup> The FCC said *Blackstone* involved only a "nominal amount of money" (Pet. App. 25a), yet, at worst, the record here suggests overcharges to NBC of some \$325 (Pet. App. 21a n.7). The FCC said Petitioner's "disregard" for the rule rendered *Blackstone* inapposite (Pet. App. 25a). But neither KORK-TV station manager knew or believed that commercials were being clipped (Reynolds did not know about even clutter clipping), whereas false bills were issued in *Blackstone* at the specific direction of the *president and principal stockholder*.

(d). The FCC said *Bluegrass Broadcasting Co.*, 43 F.C.C.2d 990 (1973), involved only a station "general manager" whereas KORK-TV's general managers were also "officers and directors" (Pet. App. 25a). However, FCC precedent says such a distinction is immaterial.<sup>8</sup> The *Bluegrass* general manager deliberately overbilled some \$36,000 in seven months—a sum 100 times greater than the KORK-TV error suggested by

<sup>7</sup> That *Blackstone* involved false "invoices" rather than "affidavits" (Pet. App. 25a) is immaterial under a rule proscribing "false documents." See *Empire Broadcasting Corp.*, 63 F.C.C.2d 634 (1977).

<sup>8</sup> See *United Broadcasting Co. of Florida*, 55 F.C.C.2d 832, 838 n.13 (1975), citing *Continental Broadcasting, Inc.*, 15 F.C.C.2d 120, 129 (1968), *recon. denied*, 17 F.C.C.2d 485 (1969), *aff'd*, *Continental Broadcasting, Inc. v. FCC*, 142 U.S. App. D.C. 70, 439 F.2d 580, *cert. denied*, 403 U.S. 905 (1971).

the record. The FCC said *Bluegrass* had received no "complaints or other facts" to alert its principals to "wrongdoing" (Pet. App. 25a); however, the four KORK-TV "program content" complaints were no warning about possible clipped *commercials* to anyone.

Claimed distinctions (FCC Br. 8 n.10) between subsequent FCC cases and this case are illusory and overlook important facts. For example:

(a). In *Microband Corp. of America*, 44 P&F Radio Reg.2d 1490 (1978), the FCC did find that inaccurate statements made to the FCC by a licensee were not a result of intent to mislead or conceal facts. In the instant case, however, the FCC refused even to consider, let alone credit, the primary factor that negated such an intent by Petitioner—reliance on expert former legal counsel who interpreted FCC inquiries and drafted Petitioner's answers (Pet. 21).<sup>9</sup>

(b). In *CBS, Inc.*, 69 F.C.C.2d 1082 (1978), the misconduct was hardly "isolated." One or more top CBS officers *repeatedly* lied to the FCC, 69 F.C.C.2d at 1090-93, and the programs at issue were broadcast over a period of more than *two years*. *CBS, Inc.*, 67 F.C.C.2d 969 (1978).<sup>10</sup> Moreover, CBS's policy to promote the

<sup>9</sup> This disparity of treatment is aggravated by the FCC's willingness to credit reliance on counsel and other defenses and mitigating factors in *Microband* (and other cases), but not in this case (Pet. 21-22). In *White Mountain v. FCC*, *supra*, the Court of Appeals noted that the FCC permits mitigating circumstances to affect the outcome of license renewal cases even when misconduct is found to have occurred. Slip op. 12-13.

<sup>10</sup> The assertion that CBS's misconduct "was not directly related to any individual stations owned by the network" (FCC Br. 8 n.10) is unconvincing since the tennis matches were broadcast by, among others, all five television stations owned and operated by the network!

tennis matches and otherwise to act in a manner later held to have misled the public and violated FCC rules was no less "deliberate" than KORK-TV's policy of clipping clutter. Moreover, like CBS's conduct, KORK-TV's practice of clipping *clutter* was at the time (1968-71) of "debatable legality in terms of the FCC rules . . .," see *White Mountain, supra*, slip op. at 12, and was not held to violate FCC rules until long after it was stopped (Pet. 5). The FCC has excused other licensees on this ground. *E.g., Hubbard Broadcasting, Inc.*, 41 P&F Radio Reg.2d 979 (1977).

(c). The claim that *Tupelo Broadcasting Co.*, 67 F.C.C.2d 1358 (1978), "involved isolated misconduct that did not result from a deliberate policy adopted by the licensee" (FCC Br. 9) overlooks the facts that the station in *Tupelo* (a) regularly deleted commercials for *four years*, (b) accepted payment in full for the deleted commercials, (c) avoided violating the fraudulent billing rule only by the fortuity that the advertising agency did not require performance affidavits (the equivalent of weekly reports to the network) as a precondition to payment, (d) did eventually violate the fraudulent billing rule as a direct result of its policy of deleting commercials, and (e) was credited for ultimately making restitution for the deleted commercials in the amount of \$4,218.75. 67 F.C.C.2d at 1367-68.

The foregoing illustrations show that there is considerably more substance to Petitioner's disparate treatment/*Melody Music* point than suggested either by the failure of the Court of Appeals to address it, or by the abbreviated glossing-over of the point in the briefs in opposition. Contrary to the contentions in the briefs in opposition, this case offers the Court an excellent, and much needed, opportunity to define the role

of judicial review of disparate agency action (including disparate imposition of an agency's ultimate sanction). Agency discretion must be guided by reasoned decision-making and judicial review must carefully test the reasons asserted by the agency for its action. Those principles were not followed in the instant case.

Nor have the briefs in opposition overcome Petitioner's showing that Supreme Court review is appropriate to resolve an apparent conflict between circuits involving this case and *Arthur Lipper Corp. v. SEC*, 547 F.2d 171 (2d Cir. 1976), *rehearing denied*, 551 F.2d 915 (1977), *cert. denied*, 434 U.S. 1009 (1978). That the schemes of FCC and SEC regulation may be different (FCC Br. 9 n.11) does not justify a different standard for judicial review of the agencies' exercise of their discretion and power. No authority is cited to demonstrate that the Congress contemplated closer judicial scrutiny of SEC actions than of FCC actions. In *Lipper* the Second Circuit struck a balance between agency discretion and judicial review; in this case the District of Columbia Circuit failed fully to perform its role of judicial review and allowed the scale to tip completely in favor of agency discretion.

2. It is important for the Supreme Court to settle whether "clear and convincing" evidence or mere "preponderance" of the evidence is the correct standard of proof in FCC proceedings that terminate broadcast licenses for alleged misconduct. Since the Congress has not decided this point, the judiciary should address it explicitly.<sup>11</sup> The absence of any property interest in a

<sup>11</sup> As this Reply goes to press, *Sea Island Broadcasting Corp. v. FCC*, No. 76-1735 (D.C. Cir., filed Aug. 12, 1976), remains pending. Accordingly, Petitioner renews its request (Pet. 12 n.6) that

broadcast license and the technically "non-penal" nature of denial of license renewal do not distinguish this case from others in which "clear and convincing" has been held the proper standard of proof.

The FCC and Valley both argue that the "clear and convincing" standard should not apply to FCC license renewal cases (a) because of the nature of a broadcast license and renewal proceedings, and (b) because *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946), states that denial of license renewal is not a penal measure (FCC Br. 6-7; V. Br. 13-17).<sup>12</sup> However, the cases relied upon by Petitioner that require "clear and convincing" proof do not turn on such factors.<sup>13</sup> Rather they are based on two other factors, neither of which the FCC denies is present in this case: (a) reliance on circumstantial evi-

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the Court defer action on its petition until *Sea Island* is finally decided in order to avoid the possibility of a different outcome on the fundamental legal issue of the appropriate standard of proof in broadcast license termination cases. Neither the FCC nor Valley has argued against such a deferral.

<sup>12</sup> Rhetoric aside, it seems clear that the FCC regarded denial of KORK-TV's license renewal as a "penalty" for its alleged misconduct. Its action was not a holding of licensee unfitness, for it subsequently renewed the licenses for seven other broadcast stations which, like KORK-TV, are wholly owned by Donald W. Reynolds, who was totally absolved by the FCC of any knowledge of, or complicity in, any of the alleged misconduct at KORK-TV.

<sup>13</sup> *E.g.*, *Collins Securities Corp. v. SEC*, 183 U.S. App. D.C. 301, 562 F.2d 820 (1977); *Nassar and Co. v. SEC*, 185 U.S. App. D.C. 125, 566 F.2d 790 (1977). A decision by this Court as to standard of proof would eliminate evident conflict between the standard of proof governing FCC license termination cases and comparable proceedings before the SEC and other Federal agencies.

dence to prove fraud, and (b) imposition of a drastic sanction tantamount to deprivation of livelihood.<sup>14</sup>

Formalistic distinctions premised on the absence of any property interest in a broadcast license cloud rather than illuminate the issue.<sup>15</sup> For instance, this Court held that a standard even higher than "clear and convincing" was appropriate in *Woodby v. Immigration and Naturalization Service*, 385 U.S. 276 (1966), even though the interest at stake was "only a conditional privilege extended . . . by the Congress as a matter of grace." *Id.* at 290 (dissenting opinion). Moreover, the alleged distinctions between an SEC broker-dealer registration and an FCC license (FCC Br. 7 n.9; V. Br. 14) do not justify different standards of proof: both a broker-dealer and a broadcaster (a) cannot do business without the appropriate agency's authorization; (b) must satisfy statutory qualification standards to obtain

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<sup>14</sup> Valley's claim of "direct" evidence of Petitioner's misconduct (V. Br. 14) is unsupported by, and indeed the record is barren of, any FCC findings based on such evidence. Its argument that "Reynolds has suffered no bar to continuing in the broadcast business—no loss of livelihood" (V. Br. 16 n.7) ignores the station managers who will likely suffer future employment impairment tantamount to deprivation of livelihood. Moreover, the question of the appropriate standard of proof transcends this case; licensees who lose their only licenses obviously will be deprived of their livelihoods.

<sup>15</sup> That "legitimate renewal expectancies" may derive from a showing of "meritorious service" (FCC Br. 6 n.7) does not weaken the reasons for applying the "clear and convincing" standard in this case. Western tried, but was not allowed, to make such a showing of KORK-TV's meritorious service to counterbalance the charges about its conduct. *Western Communications, Inc.*, 41 F.C.C. 2d 581 (Rev. Bd. 1973), *review denied*, 45 F.C.C.2d 1165 (1974). *See also* Pet. App. 65a.

it; and (c) must operate in the public interest to retain it.<sup>16</sup>

*Collins* expressly rejected the argument that a penal sanction is a necessary condition to use of the "clear and convincing" standard. 183 U.S. App. D.C. at 306-07, 562 F.2d at 825-26. Moreover, even when a sanction with a remedial purpose is used "not so much to control the [licensee] as to warn others, . . . it has a significant 'penal' component, even though the courts may choose to mask its character by calling it a 'civil' remedy." L. Jaffe, *Judicial Control of Administrative Action* 267-68 (1965) (footnote omitted), quoted in *Arthur Lipper Corp. v. SEC*, *supra*, 547 F.2d at 180-81 n.6. See also Pet. 15 n.11. It is not the label attached to a sanction that matters, but rather the "immediate hardship" it causes. *Woodby*, *supra*, 385 U.S. at 286. Here Reynolds—who unlike the broker-dealers in *Collins* and *Nassar* did not participate in, or even have knowledge of, the alleged misconduct—will forfeit a

<sup>16</sup> Compare 15 U.S.C. § 78 with 47 U.S.C. §§ 301, 307, 308, 309 & 312.

<sup>17</sup> Recent FCC "deregulation" initiatives severely undercut the FCC's expansive rhetoric about the evils of fraudulent billing (e.g., "dishonesty deserving of the utmost censure" (Pet. App. 133a)) and the legitimacy of use of the agency's ultimate sanction to deter such conduct. It now appears that the agency has had a change of regulatory heart, that the "new ethic" in vogue when Petitioner's case came up has passed on, and that the FCC "soon may decide to relax or even end its enforcement of the ban" against fraudulent billing. *Wall Street Journal*, April 13, 1979, at 26. Petitioner's fate and investment should not turn on such arbitrary and capricious ebbing and flowing of regulatory tides.

huge financial investment and inevitably be stigmatized if this decision stands.<sup>18</sup>

The fact that the legislative history of the Administrative Procedure Act indicates that the traditional "preponderance of the evidence" standard should apply to administrative proceedings is not a reason for the Court to decline to issue the writ (FCC Br. 7 & n.8). *Collins* and *Woodby* also involved administrative proceedings. Yet in the absence of clear Congressional intent in the specific statute under which the sanction was imposed, both cases held that the appropriate standard of proof was a question for the judiciary to decide. Nothing has been cited to suggest that the Congress intended that "preponderance of the evidence" should be the standard in the instant type of license renewal case.<sup>19</sup> As in *Woodby*, this Court should decide the issue.

3. The Court should decide whether there is violation of an applicant's right to a fair adjudicatory agency hearing when there is premature disclosure of tentative agency decisions, and related *ex parte* conduct, in violation of specific agency rules, particularly under the egregious facts of this case. Contrary to the contentions in the briefs in opposition (FCC Br. 10-11;

<sup>18</sup> The concession that the "clear and convincing" standard is appropriate when protected "liberty interests" are at stake (FCC Br. 7) supports review since stigma for Reynolds and stigma plus employment impairment for Tabor and Ordonez implicate fundamental liberty interests (Pet. 16).

<sup>19</sup> Compare *Terrazas v. Vance*, 577 F.2d 7 (7th Cir. 1978), *prob. juris. noted*, 47 U.S.L.W. 3636 (U.S., March 26, 1979) (No. 78-1143), requiring the Government to prove loss of nationality by "clear, convincing and unequivocal" evidence despite a statute expressly providing that "preponderance of the evidence" should be the standard.

V. Br. 25), the need for review is not obviated by the fact that the "leaks" and related agency misconduct occurred after, rather than before, oral argument and issuance of FCC instructions to its staff on how to draft the still tentative decision on Petitioner's application. The Court knows well the importance of secrecy of deliberation after, as well as before, oral argument (Pet. 29-30), and hence the importance of this issue in our system of justice.

The FCC's attempt to show that premature disclosure in this case did not chill the deliberative process misapprehends *Eastern Air Lines, Inc. v. CAB*, 271 F.2d 752 (2d Cir. 1959), *cert. denied*, 362 U.S. 970 (1960). The relevance of that case is *not* that the deliberative process was unimpaired by a press notice announcing a tentative decision six months before release of the final decision (FCC Br. 11 n.12). Rather, the crucial point is that the two-month interval between oral argument and the press notice persuaded the Second Circuit that there had been enough time for "thoughtful consideration" of the evidence between the time of oral argument and disclosure of the tentative decision. 271 F.2d at 758. The inherent prejudice to Petitioner here resulted from the fact that the leaks first occurred only minutes after oral argument, and the "locked-in" effect began at least by the time the "leaked" information was published only six days later. The "leaks" occurred even *before* instructions were given to the staff on drafting a tentative decision on Valley's application—another part of the same proceeding.

4. Review of the financial qualifications requirements of the Communications Act should be undertaken by the Court, especially since the District of Columbia

Circuit has erred twice in less than two months on the issue of the sufficiency of bank letters to establish financial qualifications.<sup>20</sup> Thus, its decisions threaten to have a continuing erroneous effect on administration of the Communications Act which the Court should rectify.<sup>21</sup>

Review should not be denied on the ground that the issue "will not have a significant effect on the administration of the Communications Act" (FCC Br. 11). At stake is a statutory qualification standard that the agency has implemented with a reasonable and long-standing policy. Judicial tampering with this policy could have far-ranging impact. Bank loan proposals are commonplace ingredients in applications for new stations, and are often crucial in the FCC's evaluation

<sup>20</sup> See FCC Br. 11. See also the FCC's February 27, 1979, memorandum in opposition (p. 3) to the petition for writ of certiorari in *RKO General Inc. v. Multi-State Communications*, No. 78-1089. In both cases the FCC has been of the view that the decisions of the Court of Appeals were in error. The Court of Appeals' decision in *Multi-State Communications, Inc. v. FCC*, — U.S. App. D.C. —, 590 F.2d 1117 (1978), *cert. denied*, 47 U.S.L.W. 3621 (U.S., March 19, 1979), involved a bank loan issue similar to the instant one and was relied upon by the Court of Appeals in this case (Pet. App. 10a).

<sup>21</sup> Contrary to Valley (V. Br. 26-30), Petitioner did not argue that the "arbitrary and capricious" standard of judicial review, rather than the "substantial evidence" standard, should have been applied in this case. See, e.g., Petitioner's reliance on 5 U.S.C. § 706(2)(E) (Pet. 34) and *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951) (Pet. 37). Petitioner cited *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978), and the other rulemaking cases at Pet. 35 as "closely analogous" instances of Court of Appeals usurpation of an agency's statutory role, not as precedent for the application of the arbitrary and capricious standard to this adjudicatory case.

of an applicant's basic qualifications. Both *Multi-State* and this case turned on such proposals, and the opinions of the Court of Appeals in these cases have already demonstrated their likely significant effect on administration of the Act. See *William A. Chapman*, FCC 79-133, slip op. at 20-23 (March 5, 1979). The recurring nature of the Court of Appeals' error and its inevitable impact on the broadcast licensing process justify review.

The writ of certiorari should be granted.

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April 18, 1979